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Supreme Court, U.S.
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No. 03 231

In The

Supreme Court of the United States

GERALD CRAWFORD AND MICHAEL WARREN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF MICHAEL WARREN

STEPHEN M. CRAMPTON
(*Counsel of Record*)
BRIAN FAHLING
MICHAEL J. DEPRIMO
AFA CENTER FOR LAW & POLICY
100 Parkgate Drive, Suite 2B
P.O. Drawer 2440
Tupelo, MS 38803
Telephone: 662.680.3886
Fax: 662.844.4234

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QUESTION PRESENTED

Whether a temporary restraining order is valid and enforceable beyond the twenty day time limit set forth in Fed. R. Civ. P. 65(b) for purposes of a criminal contempt prosecution?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The undersigned counsel of record, on behalf of Petitioner Michael Warren, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the court of appeals was entered May 13, 2003. App. 1. It is reported at *United States v. Crawford*, 329 F.3d 131 (2003). The decision and order of the district court finding Petitioner in contempt is unreported. App. 17. The opinion and order of the district court denying Petitioner's motion to dismiss is reported at *In re Criminal Contempt Proceedings against Crawford*, 133 F. Supp. 2d 249 (W.D.N.Y. 2001). App. 34.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2003. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision involved herein is the Due Process Clause of the Fifth Amendment to the United

States Constitution. The statutory provision involved is 18 U.S.C. § 403(3). That section provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Id. Additionally, this case involves Rules 65(b) and 52(a) of the Federal Rules of Civil Procedure. Rule 65(b) states:

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary

> restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Fed. R. Civ. P. 65(b).

Rule 52(a) states in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . .

Fed. R. Civ. P. 52(a).

STATEMENT OF THE CASE

A. Factual Background.

Petitioner is a frequent demonstrator near abortion clinics, where he peacefully carries signs, prays and counsels individuals seeking services at the clinics. On March 22, 1999, in anticipation of a large-scale demonstration, several abortion clinics joined with Attorney General Eliot Spitzer and filed suit against some 68 defendants, including Petitioner. App. 3. They sought both a temporary restraining order ("TRO") and a preliminary injunction. *Id. See also New York v. Operation Rescue Nat'l*, 69 F. Supp. 2d 408 (W.D.N.Y. 1999). After notice and a hearing, a broad TRO was issued on April 15, 1999, in which plaintiffs were granted virtually all of the relief they requested. Defendants were prohibited, *inter alia*, from approaching near[1] any "hospital, clinic, physician's office, or other facility" providing reproductive health care and located anywhere within the Western District of New York.[2] App. 92. The TRO contained no findings of fact or conclusions of law. *Id.*

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[1] Distances varied from 60 feet to 25 feet to 15 feet. *See* App. 93-101.

[2] The preliminary injunction, which incorporated most of the restrictions of the TRO, was appealed by Petitioner and one other named defendant and subsequently found unconstitutionally overbroad by the Second Circuit Court of Appeals. *See State of New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001). The appeals court was also troubled that the lower court "characterized legitimate protest activities as illegal interference with clinic access." *Id.* at 195. In analyzing the findings against Petitioner, the Second Circuit observed that the district court's order "contains few references to him." *Id.* at 197. Due to the lack of evidence, the appellate court vacated the injunction as to Petitioner Warren *in toto* and remanded the case. *Id.* at 200.

Although other defendants were represented by counsel at the hearing, Petitioner was not. App. 4. The Order, entitled "Temporary Restraining Order," contained a provision stating that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution." App. 102. The Order further stated that it "shall remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction." App. 103. A pre-hearing conference was scheduled for April 29, 1999, and a preliminary injunction hearing was scheduled for May 4, 1999. App. 5.

After entry of the TRO and in response to the district court's urging, Petitioner obtained legal counsel. App. 5. At the pre-hearing conference on April 29, 1999, fourteen (14) days after entry of the TRO, the district court announced his intention to extend the TRO. The court stated:

> And it's my intention, first of all, to extend the TRO ten more days. In fact, I intend to extend the TRO until the preliminary hearing has been completed. There's no question that the TRO will be in force until the hearing is completed.

Transcript of pretrial conference of April 29, 1999 at 9. The only explanation offered was that the court did not think there was "any other way to do it" given the need for a prolonged hearing.[3] *Id.*

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[3] The court converted the hearing to a status conference upon learning of the desire of some defendants to enter into a stipulation. The court also rescheduled the preliminary injunction hearing for May 25, 1999. App. 5. The hearing on the preliminary injunction was

(Continued on following page)

Some of the defendants stipulated to the extension of the TRO in order to gain additional time to prepare for the preliminary injunction hearing. Petitioner, through counsel and on the record, objected to the continuation of the TRO. App. 5. On May 1, 1999, Petitioner and co-defendant Gerald Crawford met with their attorney, Mary Aramini. Ms. Aramini advised them that under Rule 65, the TRO was good for only ten (10) days, and could be extended for an additional ten (10) days for a maximum of twenty (20) days. App. 77-80. She further informed Petitioner and Crawford that by her calculations, the TRO would automatically expire on May 4, 1999. As to criminal contempt, Ms. Aramini informed them that although the second ten day period during which the TRO was extended seemed to be a "legal limbo" importing some ambiguity as to the validity of the TRO, after that period they "had a solid defense that the TRO didn't exist after May 4th." App. 80, 81.

Two weeks after the apparent expiration of the TRO, on May 18, 1999, Petitioner returned to the areas covered by the TRO to engage in his First Amendment expressive activities. Neither abortion clinic personnel nor law enforcement authorities confronted Petitioner, thus confirming Petitioner's conclusion that the TRO had expired of its own accord. App. 21. He therefore returned to the clinics again on May 22, and once more on July 14, 1999. App. 21-22.

The preliminary injunction hearing began on August 3, 1999. On August 6, during the hearing, the plaintiffs

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subsequently rescheduled several times, and finally commenced on August 3, 1999. App. 6.

applied for and obtained an order to show cause why Petitioner and co-defendant Gerald Crawford should not be held in criminal and civil contempt for violating the TRO. On August 17, 1999, the district court referred the contempt matter to the United States Attorney's Office for further investigation and prosecution. App. 6. The preliminary injunction hearing concluded on September 29, 1999. *Id.* The decision and order granting a preliminary injunction was not issued until July 26, 2000, some 468 days after entry of the TRO. App. 44.

B. Criminal Contempt Proceedings

On March 24, 2000, the government commenced a criminal contempt proceeding against Petitioner and Crawford. App. 7. Petitioner moved to dismiss on grounds that the TRO had expired by law no later than May 13, 1999,[4] and thus had expired on its own before Petitioner returned to the forum. App. 17-18. Magistrate Judge Kenneth Schroeder, to whom the matter had been referred, recommended that the motion to dismiss be granted, relying on this Court's opinion in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). App. 34-35. The district court, however, rejected the recommendation. In a Decision and Order entered February 27, 2001, the court found the TRO had become a preliminary injunction once extended beyond the time limits of Rule 65(b). The district court distinguished *Granny Goose* on the basis that the TRO here provided

[4] This date is calculated by counting twenty business days from entry of the TRO on April 15, 1999.

explicit notice that it would remain in effect until resolution of the preliminary injunction motion, whereas in *Granny Goose* the Union was given no such notice. App. 47. The court also limited the possible sentence for either defendant to six months imprisonment or a $5,000 fine. App. 7. A non-jury trial was held on June 5, 2001. After additional briefing and argument, Petitioner and Crawford were found guilty and sentenced to thirty days incarceration for each offense, sentence to run concurrently. *Id.*

The Second Circuit affirmed. App. 1. The court held that because the TRO was issued after notice and a hearing, "a valid order existed," and Petitioner and Crawford were properly punished for criminal contempt by disobeying the order. App. 8-9. The appeals court further opined that the validity of the TRO itself was not relevant to the question of criminal contempt, and therefore refused to reach that issue. App. 9. Regardless of the validity of the TRO, the court reasoned, the proper course for challenging the order was by appeal, not by disobedience. *Id.*; *see also* App. 11, 14. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Petition Should be Granted Because the Decision of the Court Below Conflicts with this Court's Decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423 (1974).

The Second Circuit Court of Appeals became only the second federal appellate court in the history of American jurisprudence to uphold criminal sanctions for contempt

for violation of an indefinitely-extended TRO.[5] The court below held that Petitioner and Crawford were properly convicted of criminal contempt because, even though the TRO had exceeded the time limits in Rule 65(b), the defendants had received notice and an opportunity to be heard, and because the TRO put them on notice that it would remain in effect until completion of the preliminary injunction hearing. App. 11-14. The appellate court relied heavily on this Court's decision in *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), in which it was held that a TRO extended beyond the twenty day time limit of Rule 65(b) was treated as a preliminary injunction for purposes of appellate review.[6]

The Second Circuit reasoned that the TRO here, having been extended beyond the Rule 65(b) limits, became a preliminary injunction for all purposes, and the

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[5] The other case was *Levine v. Securities Exchange Comm'n*, 70 F.3d 1191 (11th Cir. 1995), *cert. denied sub nom., Law Practice of J.B. Grossman, P.A. v. SEC*, 519 U.S. 809, 117 S.Ct. 53, 136 L.Ed.2d 16 (1996), upon which the Second Circuit relied.

[6] *Sampson* involved highly unusual facts. There, a government employee sought a TRO against her dismissal from employment. At the hearing, at which the government appeared and presented a defense, the court desired to hear from the official responsible for the discharge. The government, however, refused to produce him, proffering instead an affidavit. The court thereupon entered an order granting the TRO and ordered the temporary restraint continued until the witness appeared. After expiration of the statutory period, the government appealed. This Court determined that, "*at least in the type of situation presented here*," the TRO should be treated as a preliminary injunction. *Sampson*, 415 U.S. at 86 (emphasis added). The Court ultimately dissolved the injunction. As is plain from the facts, the extension of the TRO was necessitated by the conduct of the defendants, and it remained in the hands of the government defendants throughout to terminate the injunction by producing the witness. The situation here is otherwise.

proper course for Petitioner and Crawford to challenge it was not by ignoring it but by appealing it. App. 10-11. The court thereby transformed the *Sampson* rule from a shield *protecting* the parties enjoined into a sword doing them *harm*. This holding misapprehends *Sampson* and is contrary to *Granny Goose*.[7]

Granny Goose was decided only three weeks after *Sampson*, and unlike *Sampson*, *Granny Goose* involved a criminal contempt charge. This Court held that criminal contempt will not lie for violation of an expired TRO, even

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[7] The Second Circuit's reliance upon *Levine* was also erroneous. In *Levine*, the Eleventh Circuit Court of Appeals held that a lawyer who transferred client funds out of an account frozen by an extended TRO into his own account was guilty of criminal contempt where the trial court had extended the TRO in open court at the conclusion of the preliminary injunction hearing, and the preliminary injunction was entered shortly thereafter, within just a few days of the expiration of the TRO. *Levine* is not persuasive authority for a number of reasons. The defendant there was a lawyer, charged with a higher degree of knowledge of the rules and held to a higher standard of conduct as an officer of the court. *Levine*, 70 F.3d at 1191. Further, because the lawyer had actively participated in a full evidentiary hearing before the TRO was extended, *Levine* is on all fours with *Sampson*. As the Eleventh Circuit observed, "[t]hat a hearing on a preliminary injunction had been held and that appellate review was, therefore, available under *Sampson*, makes this case materially different from *Granny Goose*." *Id.* at 1193. In addition, the TRO had arguably not even expired in *Levine*, as the preliminary injunction was entered *nunc pro tunc* within the time limits of Rule 65(b). *Id.* In any event, the *Levine* majority misconstrued *Granny Goose* in the same way the Second Circuit did here. *But see Levine*, 70 F.3d 1194-1198 (Hill, J., concurring *dubitante*) (in upholding the criminal contempt and construing *Sampson* and *Granny Goose* as they did, "we eviscerate the protection afforded by Rule 65(b). If a TRO can metamorphose into a preliminary injunction by the expiration of the very time limits imposed as safeguards against the indefinite restraint over one's property, then Rule 65(b) provides no protection at all.").

after the party enjoined has received notice and an opportunity to be heard. "Where a temporary restraining order has been continued beyond the time limits permitted under Rule 65(b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid." *Granny Goose*, 415 U.S. at 444 (citing Rule 52(a)). In other words, mere extension of a TRO does not *ipso facto* make it a valid preliminary injunction for purposes of a criminal contempt prosecution.

Due process requires that "those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Id.* at 444. Parties against whom an injunction operates must not be left "to guess about its intended duration." *Id.* Moreover, Rule 65(b) strictly limits the life span of a TRO to ten days, which may be extended "for a like period," i.e. another ten days.

> Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And *where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b).*

Id. at 444-445 (emphasis added). In other words, the proper means by which to enter an injunction of indefinite duration is to *supplant* the original TRO with a second order which clearly states that it is intended to last indefinitely. Under *Granny Goose*, then, in the context of a criminal contempt charge, a TRO continued beyond the Rule 65(b) time limit "is invalid."

The Second Circuit determined that because Petitioner and Crawford were given notice both of the pendency of the motion and of the duration of the Order, as well as an opportunity to be heard in opposition, no additional process was due them. By contrast, this Court counseled in *Granny Goose* that merely providing notice and a hearing at a stage prior to the hearing on a preliminary injunction "'cannot serve to extend indefinitely beyond the period limited by [Rule 65 (b)] the time during which a temporary restraining order remains effective.'" *Id.* at 443 (brackets in original) (quoting *Pan American Airways*, *supra*, 306 F.2d 840, 842). Contrary to the Second Circuit's holding, this Court in *Granny Goose* underscored that "'[t]he [Rule] contemplates that notice and hearing shall result in an appropriate adjudication, i.e., the issuance or denial of a preliminary injunction, not in extension of the temporary stay.'" *Id.* at 443-444 (quoting *Pan American Airways*).[8]

[8] The difference in the treatment of the TRO between the Second Circuit and *Granny Goose* is significant for another reason as well. If, at the time of Petitioner's alleged offense, the TRO constituted a "valid" albeit perhaps erroneous order, as the Second Circuit found, App. 9, then Petitioner and Crawford may appropriately be found guilty of criminal contempt. If, on the other hand, the TRO was "invalid," as *Granny Goose* found, 415 U.S. at 444, then the criminal contempt conviction was improper. As this Court said in *Granny Goose*, "[t]here being no order to violate, the District Court erred in holding [Petitioner] in contempt." *Id.* at 445.

II. The Petition Should be Granted in Order to Resolve a Conflict among the Circuits as to the Propriety and Effect of a Temporary Restraining Order Extended Beyond the Time Limits Contained in Rule 65(b).

Alternatively, the petition for certiorari should be granted in order to resolve a conflict among the circuits concerning the propriety and effect of a federal district court indefinitely continuing a temporary restraining order. This issue should be settled by this Court because it is vital to the public interest, routinely affecting as it does an infringement of constitutional rights of the parties enjoined. Furthermore, the decision of the Second Circuit represents a forceful overreach of judicial authority that calls for the supervisory powers of this Court.

The great majority of courts confronted with the issue of a TRO of indefinite duration have treated it as a preliminary injunction, at least for purposes of appeal. *E.g., Nutrasweet Co. v. Vit-Mar Enterprises, Inc.*, 112 F.3d 689, 693 (3d Cir. 1997); *Levine, supra,* 70 F.3d 1191, 1193; *Hudson v. Barr*, 3 F.3d 970, 973 (6th Cir. 1993); *International Primate Protection League v. Administrators of Tulane Educational Fund*, 895 F.2d 1056 (5th Cir. 1990), *rev'd on other grounds*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991); *In re Golden Plan of California*, 36 B.R. 95, 96 (9th Cir. 1984); *National Mediation Bd. v. Air Line Pilots Ass'n*, 323 F.2d 305 (D.C. Cir. 1963); *Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962).

With the exception of the Second Circuit here and *Levine* in the Eleventh Circuit, those courts which have considered the matter require that the injunctions comply with Rule 52(a) (by including formal findings of fact and

conclusions of law) and/or that they continue only with the consent of the enjoined. *E.g.*, *Nutrasweet*, *supra* (TRO continued beyond limits of Rule 65(b) "ceases to be a 'temporary restraining order' within the purview of that section and becomes a preliminary injunction which cannot be maintained unless the court issuing it sets out the findings of fact and the conclusions of law which constitute the grounds for its action as required by Rule 52(a)"); *Hudson v. Barr*, *supra* (without consent of the party enjoined or compliance with Rule 52(a), an extended TRO must be dissolved); *In re Golden Plan of California*, *supra* (same); *Sims v. Greene*, 160 F.2d 512, 517 (3d Cir. 1947) (same).

A few older cases dealing with an extended TRO treat the injunction as having expired of its own accord, or refuse to entertain a request to extend a TRO. *E.g.*, *Commonwealth Oil Refining Co. v. Lummus Co.*, 174 F.Supp. 485 (D. P.R. 1959), *rev'd on other grounds*, 280 F.2d 915 (1st Cir. 1960), *cert. denied*, 364 U.S. 911, 81 S.Ct. 274, 5 L.Ed.2d 225 (1960), (holding that court was without power to extend TRO *even one day* beyond period prescribed in Rule 65(b) without consent of the party restrained, even though that party was then in court and litigating the questions involved); *Benitez v. Anciani*, 127 F.2d 121 (1st Cir. 1942), *cert. denied*, 317 U.S. 699 (1943); *Southard & Co. v. Salinger*, 117 F.2d 194 (7th Cir. 1941).

In the aftermath of *Levine* and the Second Circuit's opinion in the instant case, there exists a conflict in the circuits as to whether a TRO without formal findings of fact and conclusions of law, extended beyond the time limits of Rule 65(a) without the consent of the enjoined, becomes a preliminary injunction for all purposes, or instead is appealable only for purposes of dissolution. This

conflict implicates both Rules 65(b) and 52(a) as well as important questions as to the inherent powers of federal courts vis-à-vis the due process rights of litigants.[9]

III. The Petition Should be Granted Because the Question Presented is Vital to the Public Interest and Calls for an Exercise of This Court's Supervisory Power.

One of the bedrocks of our adversary system is the due process requirement that each party receive notice and an opportunity to be heard. A TRO, being an emergency proceeding, disturbs that balance in order to avoid another evil, the possibility of irreparable harm. In order to provide immediate relief to one party who would otherwise suffer irreparable harm before a preliminary injunction can be obtained, a TRO deprives another party of a full and fair opportunity to be heard in protecting his rights. However, the balance of harms analysis in a TRO is based on the presumption that the duration of a TRO will be quite limited.

When a TRO is extended indefinitely, being allowed to operate for months on the cursory evidence and arguments

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[9] The frequency of use of temporary restraining orders is great, and appears to be expanding. In *Levine*, which involved a TRO sought and obtained by the SEC, the court observed that "[a]n electronic search using only the words 'Securities and Exchange Commission' and 'temporary restraining order' or 'TRO' yielded 11,541 cases." *Levine, supra*, 70 F.3d 1191, 1194 n.1 (Hill, J., concurring *dubitante*). Similarly, an electronic search of the United States District Courts since April 15, 1999 (the date the TRO was entered herein) using the words "temporary restraining order" or "TRO" yielded 2,365 cases. Plainly, the effect of the resolution of this case will be widespread.

presented, a pernicious injustice is wrought upon the defendant. For this reason, the grant of prolonged injunctive relief in advance of trial is contingent upon a full preliminary injunction hearing in which the court may take evidence, carefully consider the law and the facts, and then make findings of fact and conclusions of law supporting such relief as is granted.

The Rules of Civil Procedure reflect this delicate balance in setting strict time limits for the duration of a TRO and establishing firm guidelines under which an order may issue. The rules also reflect the significant difference between a preliminary injunction and a TRO by requiring a full evidentiary hearing resulting in formal findings of fact and conclusions of law before a preliminary injunction may be issued. *See* Rule 52(a). In addition, there are stricter evidentiary standards required at a preliminary injunction hearing, and of course a preliminary injunction may be immediately appealed.

This case transcends all cultural issues and contemporary legal differences because the issuance of a TRO may affect any party against whom a suit is brought. To allow a TRO to metamorphose into a preliminary injunction demolishes the balance of harms inherent in the structure of Rule 65. Quite apart from the severity of criminal sanctions, the fact that constitutional rights may be suppressed indefinitely during its operation is enough to make it intolerable. The balance currently reflected in the rules between preventing irreparable harm to the party seeking the injunction and protecting the due process rights of the party sought to be enjoined well serves the underlying goals. The decision of the Court of Appeals in this case fails to protect the due process interests of parties enjoined because it fails to preserve that

balance, instead permitting a boundless exercise of judicial discretion by the district judge. The proper limits of due process should be restored. This Court should grant certiorari.

IV. The Petition Should be Granted in Order to Resolve the Tension Between the Use of Contempt Powers in the Context of an Extended Temporary Restraining Order and the Loss of First Amendment Rights.

The issue here also involves the tension between the use of contempt powers to enforce "temporary" injunctions issued without benefit of a fully developed evidentiary hearing and the loss of First Amendment rights. Petitioner's participation in the TRO hearing was minimal at best, entailing a *pro se* appearance and apparently no testimony or input whatsoever. Furthermore, there is little question that the TRO here inhibited Petitioner's First Amendment rights. After all, the subsequent preliminary injunction was ultimately vacated as to Petitioner and held unconstitutionally overbroad in part. Further, the TRO expressly stated that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution." App. 102.

The legitimate use of the contempt power to vindicate the court's authority, and the danger in permitting a party to sit as his own judge as to the validity of a court order cannot be gainsaid. *See, e.g., Young v. U.S.*, 481 U.S. 787, 796, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). The general rule, of course, is that "[a]n injunction duly issuing out of a court of general jurisdiction with equity powers upon

pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be." *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

Petitioner fully complied with the conditions of the TRO during the twenty day Rule 65(b) period. He then consulted with counsel concerning the duration of the TRO, and was assured that it would expire of its own accord on the twentieth day. App. 80-81. Only after passage of the twenty days did he consider returning to the clinics where he routinely demonstrated, and while there conducted himself peaceably. *Cf. Walker, supra* (criminal contempt for violation of state temporary injunction upheld where enjoined parties made no attempt to comply with its terms or to challenge or modify it).

There are exceptions to the so-called "collateral bar doctrine" requiring unquestioned compliance with a court order when, for instance, the injunction is "transparently invalid." *Walker*, *supra*, 388 U.S. at 315; *see also* App. 14 n.6 (same). Indeed, it appears to be this principle that undergirds the holding in *Granny Goose*. Such exceptions apply here with equal force. These exceptions take into account the awesome power contempt provides and the attendant potential for abuse.

> "The power of the courts to punish for contempt has always been looked on in this country with much jealousy, and a very strong disposition shown in all jurisdictions to restrain it. It has been declared to be arbitrary in its nature, and to be an exception to the provisions of the Constitution of the United States and not to be extended in the least degree beyond the limits imposed by statute."

In re Gitkin, 164 F. 71, 74 (E.D. Pa. 1908) (citations omitted); *accord*, *Granny Goose*, *supra*, 415 U.S. at 444.

This Court has long echoed these concerns over the use and abuse of the contempt power: "The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt – it is an arbitrary power which is liable to abuse. Its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Bloom v. Illinois*, 391 U.S. 194, 202, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (internal quotation marks and citations omitted).

The Second Circuit's decision, if left undisturbed, will provide fruitful ground for the tares of abuse of the contempt power to grow in the fields of legitimate injunctions. In the same breath, it does away with both the time limits governing temporary restraining orders and the necessity for findings of fact and conclusions of law governing preliminary injunctions. In effect, the Second Circuit has erased the "T" from the TRO – there is, after all, nothing temporary about an injunction lasting 468 days.

The severity of this erasure is difficult to overstate.

> "It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective."

Pan American World Airways, Inc. v. Flight Engineers Int'l Ass'n, 306 F.2d 840 (2d Cir. 1962); *accord*, *Hudson v. Barr*, 3 F.3d 970, 975 (6th Cir. 1993).[10]

The Second Circuit's ruling also effectively rewrites Rule 65(b). Where *Granny Goose* respected the Rule's mandatory limits on the ability of courts to enter injunctive relief without a full and fair adversarial hearing, the Second Circuit's decision reduces these essential safeguards to mere optional accessories, to be employed or ignored at the sole discretion of the courts. By eviscerating the time limits set forth in the rule, the court below stripped away the single most important protection of the rights of those enjoined:

> It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

Pan American World Airways, *supra*, 306 F.2d 840, 843.

The ruling of the Second Circuit also wreaks havoc on the tripartite division of injunctions, further blurring the already-indistinct line between a temporary restraining

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[10] Although the time limits in Rule 65(b) are set forth in the context of a TRO issued without notice, it is well settled that they apply equally to a TRO issued with notice. *See*, *e.g.*, *Granny Goose*, *supra*, 415 U.S. 423, 433; *Nutrasweet*, *supra*, 112 F.3d at 692; *Pan Am*, *supra*, 306 F.2d at 840; *Connell v. Dulien Steel Prods., Inc.*, 240 F.2d 414 (5th Cir. 1957), *cert. denied*, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958).

order and a preliminary injunction and thus rewriting Rule 65 in yet another way. The Order here: (1) failed to contain findings of fact and conclusions of law as required of all preliminary injunctions under Rule 52(a); (2) was entitled "Temporary Restraining Order"; (3) according to the trial court itself, was entered as a precursor to a preliminary injunction, the hearing for which was originally scheduled to be held within twenty (20) days of entry of the TRO; and (4) was extended by the court on the tenth business day after it was entered, consistent with Rule 65(b). These factors demonstrate that the district court considered itself bound by Rule 65(b). Nonetheless, the Second Circuit's decision effectively licenses the district courts to disregard the restraints of the rules of procedure. Under the Second Circuit's precedent, courts may now dispense with the burden of prompt evidentiary hearings altogether, and issue instead indefinite injunctions binding the parties for as long as the courts like, in their sole discretion. The court below has thus created a dangerous precedent inviting "government by injunction."[11]

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[11] *See, e.g., New York Times Co. v. U.S.*, 403 U.S. 713, 742, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) ("The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It did not provide for government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress.") (internal citation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. CRAMPTON
(Counsel of Record)
BRIAN FAHLING
MICHAEL J. DEPRIMO
AMERICAN FAMILY ASSOCIATION
CENTER FOR LAW & POLICY
100 Parkgate Drive
P.O. Drawer 2440
Tupelo, MS 38803
(662) 680-3886

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

Argued: October 15, 2002 Decided: May 13, 2003

Docket Numbers: 02-1201 (L) & 02-1202 (Con)

In Re: Criminal Contempt Proceedings
Against Gerald Crawford and Michael Warren

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD CRAWFORD and MICHAEL WARREN,

Defendants-Appellants.

Before: NEWMAN and POOLER, *Circuit Judges*, and JONES,* *District Judge*.

Gerald Crawford and Michael Warren appeal from a judgment of the United States District Court for the Western District of New York (Richard J. Arcara, District Judge) convicting them of criminal contempt for violating a temporary restraining order and sentencing each of them to 30 days imprisonment. The principal question presented on this appeal is whether the appellants were obliged to obey the order which was extended without

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* Honorable Barbara S. Jones of the United States District Court for the Southern District of New York, sitting by designation.

their consent beyond the 20 day limitation period of Rule 65(b) of the Federal Rules of Civil Procedure

We conclude that because the temporary restraining order was granted after notice and a hearing, and was unambiguous as to its terms, it continued in effect as a preliminary injunction and was binding on the appellants. We therefore affirm the convictions.

MARYBETH COVERT, Asst. Federal Defender, (Kimberly A. Schechter, Asst. Federal Defender on the brief) Buffalo, NY, for Defendant-Appellant Gerald Crawford.

BRYAN J. BROWN, Esq., Tupelo, Mississippi, for Defendant-Appellant Michael Warren.

PAUL J. CAMPANA, Asst. U.S. Atty., (Michael A. Battle, U.S. Atty. on the brief) Buffalo, NY, for Appellee.

BARBARA S. JONES, *District Judge*:

Appellants Gerald Crawford and Michael Warren appeal their criminal contempt convictions for violating a temporary restraining order ("TRO" or "the Order") following a bench trial before Judge Richard J. Arcara of the United States District Court for the Western District of New York. The appellants contend that the TRO, which was issued by Judge Arcara on April 15, 1999, and extended on April 29, 1999, automatically expired pursuant to Fed. R. Civ. P. 65(b) prior to the conduct at issue, and thus could not support a conviction for criminal contempt. We disagree and affirm the district court's convictions for criminal contempt.

I. BACKGROUND

The TRO underlying this appeal was issued in *New York v. Operation Rescue Nat'l*, 69 F. Supp. 2d 408 (W.D.N.Y. 1999).[1] In that case, the plaintiffs – the People of the State of New York, medical facilities and doctors who provide reproductive health care services, and other organizations who advocate choice for women with respect to abortion – commenced suit on March 22, 1999 against 68 defendants, including appellants Crawford and Warren. The plaintiffs sought a TRO and preliminary injunction to establish limited buffer zones around abortion facilities in order to prevent the defendants from engaging in illegal activities designed to disrupt access to those abortion facilities.

Judge Arcara granted plaintiffs' application for an expedited hearing on their motion for a TRO on March 24, 1999. The hearing was scheduled for April 8, 1999, and the defendants were given until April 6, 1999 to respond to the motion. The defendants submitted various opposition papers on April 6 and 7.

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[1] This appeal relates to litigation that began in 1992 involving anti-abortion protests occurring in the Western District of New York. The background facts of this case are presented in the district court opinion granting an injunction limiting such activities, and this Court's opinions with respect to that injunction. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992), *aff'd in part & rev'd in part sub nom. Pro-Choice Network of Western New York v. Schenck*, 67 F. 3d 359 (2d Cir. 1994), *aff'd in banc*, 67 F. 3d 377 (2d Cir. 1995), *aff'd in part and rev'd in part*, 519 U.S. 357 (1997). For purposes of the present appeal we assume familiarity with those cases.

The TRO hearing was held on April 8, 9, and 12. Gerald Crawford and Michael Warren appeared at that hearing *pro se*. The defendants contested the TRO, both legally and factually. Several defendants submitted affidavits denying the factual allegations contained in plaintiffs' complaint and motion papers. When the proceedings were concluded on April 12, 1999, Judge Arcara gave the parties until the following day to file any supplemental papers. He also set a briefing schedule before closing the record. Additional affidavits were filed on April 13 and 14, 1999.

On April 15, 1999, the district court issued a TRO prohibiting the defendants from being present within buffer zones around reproductive health care facilities in the Western District of New York. Among other things, the TRO prohibited the defendants

> at the reproductive health care facility of Planned Parenthood of the Rochester/Syracuse Region . . . from: (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the public sidewalk within a buffer zone measured from 50 feet from the northwestern edge of the driveway entrance going towards North Street, and measured from 25 feet from the edge of the building going southeast towards Scio Street . . . [and] at Genesee Hospital in Rochester, New York, from: (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present within a buffer zone measured from fifteen feet from either edge of any driveway, walkway, or doorway entrance to such facility.

(TRO issued 4/15/99 at ¶ 3(A), ¶ 13(A)). According to the express terms of the TRO, it was enforceable "by a motion

for criminal and/or civil contempt," and was to "remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction." (TRO issued 4/15/99 at 16, 18).

On April 15, 1999, the district court also issued an order scheduling a pre-hearing conference for April 29, 1999 and a preliminary injunction hearing for May 4, 1999. The district court converted the April 29 conference into a status conference upon being advised that the parties were engaged in "serious settlement discussions." *In re Criminal Contempt Proceedings Against Crawford*, 133 F. Supp. 2d 249, 253 (W.D.N.Y. 2001). Crawford and Warren both appeared at the April 29 conference through counsel, although they had previously appeared *pro se*. The parties reported that four defendants had already been dismissed from the case and that the parties wished to pursue additional settlement discussions. The district court, therefore, adjourned the preliminary injunction hearing to May 25, 1999, reminding the parties that the TRO would continue to remain in effect until the completion of the hearing on the preliminary injunction. Even though all of the defendants consented to the postponement of the preliminary injunction hearing, they also objected to the continuation of the TRO.

On May 21, 1999, Warren and Crawford, and several other defendants, moved to sever the claims against them and to transfer those claims to Rochester, New York, or instead to sever the claims against them for a separate proceeding and trial before Judge Arcara. Judge Arcara denied this motion on June 16, 1999, along with all other outstanding motions. *See Operation Rescue Nat'l*, 69 F. Supp. 2d at 416-19.

The hearing scheduled for May 25, 1999 was again adjourned at the request of the parties. Instead, Judge Arcara held a status conference at which he was advised that several of the defendants had agreed to be bound by the TRO and further injunctive relief by the district court, and that several other defendants would default if required to file an answer rather than agree to be bound by the TRO. Judge Arcara decided to delay the preliminary injunction hearing until the settlement and default judgments were finalized and scheduled the preliminary injunction hearing for July 28, 1999. The hearing was adjourned until August 3, 1999 due to the district court's trial calendar and a delay in finalizing the settlements and default judgments. By this time, only 23 of the 68 defendants remained in the case.[2]

The preliminary injunction hearing lasted 23 days, commencing on August 3, 1999 and ending on September 29, 1999. On August 6, 1999, during the preliminary injunction hearing, the plaintiffs applied for an order to show cause why Gerald Crawford and Michael Warren should not be held in criminal contempt for violating the April 15, 1999 TRO on May 18, May 22, and July 14, 1999. Judge Arcara held a hearing on the order to show cause on August 17, 1999, and thereafter referred the matter to the United States Attorney's Office for the Western District of New York for investigation, and, if appropriate, for prosecution.

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[2] Warren disputes this account of why the hearing was adjourned several times, but does not directly offer his own version of the events. The reasons for the adjournments, however, are not relevant to our decision.

The United States filed a "Notice of Criminal Contempt" ("Notice") against appellants Gerald Crawford and Michael Warren on March 24, 2000, pursuant to Fed. R. Crim. P. 42. The Notice charged that one or both appellants, on three separate dates, knowingly and willfully disobeyed the TRO entered by Judge Arcara on April 15, 1999. Count One of the Notice charged that Warren violated the TRO on May 18, 1999 by demonstrating against abortion on a public sidewalk within fifteen feet of a driveway at the Genesee Hospital, which was within the buffer zone. Count Two charged that on May 22, 1999, both Warren and Crawford demonstrated against abortion within fifteen feet of the Genesee Hospital, within the buffer zone. Finally, Count Three charged both Warren and Crawford with demonstrating against abortion within the buffer zone at the Planned Parenthood clinic in Rochester on July 14, 1999.

Judge Arcara denied the appellants' motions to dismiss the contempt charges on February 27, 2001 and limited the appellants' maximum punishment to six months imprisonment or a $5,000 fine. Both Crawford and Warren were tried in a bench trial on June 5, 2001. *In re Criminal Contempt Proceedings Against Crawford*, 133 F. Supp. 2d at 266.

On August 17, 2001, Judge Arcara found both appellants guilty of violating the April 15, 1999 TRO and sentenced Warren to three 30-day concurrent sentences and Crawford to two 30-day concurrent sentences. Both appellants' sentences were stayed pending this appeal.

II. DISCUSSION

A. The Criminal Contempt Convictions Are Valid

Rule 65(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> Every temporary restraining order . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

Thus, a district court is permitted to extend a TRO for "a like period" if "good cause" is shown. The Supreme Court has interpreted the phrase "a like period" as permitting a court to extend the TRO for "up to an additional 10 days." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 440 n.15 (1974).

In this case, the district court extended the April 15, 1999 TRO on April 29, 1999 until the preliminary injunction hearing was completed. The defendants contend that under Rule 65(b), the TRO could only be extended without consent through May 14, 1999. As Crawford and Warren's criminal conduct occurred after that date, their principal argument on appeal is that they cannot be held criminally liable for violating an order that did not exist. As we discuss *infra*, because this Order was issued after notice

and a hearing, we find that a valid order existed and, consequently, this argument fails.[3]

In drawing this conclusion we first turn to *Sampson v. Murray*, 415 U.S. 61 (1974). In *Sampson*, the Supreme Court held that the D.C. Circuit had appellate jurisdiction over a TRO which a district court had issued and extended indefinitely pending the appearance of a witness. In concluding that appellate jurisdiction over the TRO existed despite the fac, that TROs are ordinarily unappealable, the Supreme Court stated that it would "view the order at issue here as a preliminary injunction." *Sampson*, 415 U.S. at 88.[4] The Court then proceeded to consider the preliminary injunction on its merits.

This Circuit reached a like conclusion in *Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, PAA Chapter, AFL-CIO*, 306 F.2d 840 (2d Cir. 1962). There, the district court extended a temporary restraining order which prohibited a strike by flight engineers "far beyond the limits prescribed by Rule 65(b)." *Pan Am.*, 306 F.2d at 842. Noting that ordinarily there can be no appeal from

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[3] We note that whether this Order would have been vulnerable to reversal on appeal had it been appealed is not the issue before us.

[4] Additionally, in *Sampson*, the Supreme Court rejected the argument made here by appellant Warren that to consider the extended TRO a preliminary injunction permits the district court to disregard Fed. R. Civ. P. 52(a). Specifically, the *Sampson* Court found that although the district court may not have complied with Rule 52(a), to find that a TRO which was extended beyond the limits of Rule 65(b) is not reviewable on appeal would permit "an order which neglects to comply with one rule [to] be saved from the normal appellate review by its failure to comply with still another rule." *Sampson*, 415 U.S. at 86-87 n.58.

the issuance of a temporary restraining order, we reasoned that "the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. § 1292(a)(1)." *Pan Am.*, 306 F.2d at 843. We further concluded that "because the district judge extended the order beyond the twenty day period, . . . the temporary restraining order became an appealable preliminary injunction." *Pan Am.*, 306 F.2d at 843 n.4. We then proceeded to consider the case on the merits.

The appellants urge that the holdings of *Sampson* and *Pan Am.* should be limited to the proposition that TROs extended past the time limits imposed by Rule 65(b) are merely considered preliminary injunctions for purposes of appealability. This interpretation has no merit. By reviewing the orders on the merits, the *Sampson* and *Pan Am.* courts must have considered the orders as ones which continued to bind the parties. To find otherwise would result in an advisory opinion on an order that no longer existed.

The Eleventh Circuit reached the same conclusion we reach today. In *Levine v. Comcoa Ltd.*, 70 F.3d 1191 (11th Cir. 1995), the Eleventh Circuit upheld a district court's finding of contempt for violation of a TRO that had been extended until the district court ruled on substantive motions. The *Levine* court rejected the appellant's argument that an order ceased to exist on the 21st day after the TRO issued, finding instead that the TRO "became a preliminary injunction when [it], as orally extended by the district court, went beyond the time permissible under Rule 65." *Levine*, 70 F.3d at 1193. The Eleventh Circuit further concluded that "[n]o good reason exists to limit

th[e] rule [that a TRO extended beyond the limits of Fed. R. Civ. P. 65(b) is to be treated as a preliminary injunction] to one of appellate jurisdiction only: a preliminary injunction is a preliminary injunction." *Levine*, 70 F.3d at 1193 n.8. We agree.[5]

Significantly, in *Sampson* and *Pan Am.*, the parties had notice of the district court's order and had the opportunity to present their opposition to it. The same is true here. Consequently, appellants' reliance on *Granny Goose* is misplaced. In *Granny Goose*, a state court issued a TRO enjoining a union from striking. Two days after the TRO was issued, the case was removed to federal court where the district court denied a motion to dissolve the TRO. The TRO was silent as to its intended duration. The union went on strike over six months later, and was subsequently held in contempt for violating the TRO. The Ninth Circuit reversed the district court's finding of contempt, and the Supreme Court affirmed, stating that "since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve

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[5] The extension of the district court's Order in this case after notice and an opportunity to be heard functioned as a preliminary injunction for the abbreviated interval between the date of the extension and the date of a hearing on a preliminary injunction, that, if issued, would last until trial on the merits. Had Crawford and Warren timely appealed this order, they could have raised any inadequacies they perceived in the hearing afforded them as well as any other arguments they had concerning the order's validity, including the district court's failure to make findings of fact and conclusions of law. By upholding the district court's contempt order, we express no opinion on the procedures the district court followed in issuing the order on which the contempt finding was based. We merely hold that Crawford and Warren were obliged to appeal before flouting the order.

the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued." *Granny Goose*, 415 U.S. at 445. As such, the union could "reasonably assume that the order ha[d] expired within the time limits imposed by Rule 65(b)." *Granny Goose*, 415 U.S. at 445.

Here, the appellants were on notice that an enduring order had been issued. The April 15, 1999 TRO was explicit on this point stating:

> IT IS FURTHER ORDERED that this Order shall remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction.

(TRO issued 4/15/99 at 18). At the subsequent status conference on April 29, 1999, the district court again made clear that the TRO was to remain in effect.

Additionally, in *Granny Goose*, the Supreme Court found important to its holding the fact that the district court, in ruling on the union's motion to dissolve the TRO, had not addressed "the various equitable factors involved in considering a preliminary injunction, but only considered the employers' argument that the case should be remanded to the state court because the right to remove had been waived. . . . " *Granny Goose*, 415 U.S. at 442. In the instant case, however, the district court heard defendants' legal and factual arguments as to why the TRO should not be issued, considered several defendants' affidavits with respect to the facts, and observed photographic and video evidence at the three-day TRO hearing. Accordingly, we find that the requirement of notice and an opportunity for a hearing contemplated by *Sampson* and

Pan Am., but missing in *Granny Goose*, was satisfied by the hearing in this case.

Warren also argues, based on *Tekkno Labs., Inc. v. Perales*, 933 F.2d 1093 (2d Cir. 1991), that the TRO cannot be deemed a preliminary injunction because Judge Arcara failed to make findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a). In *Tekkno Labs.*, we reversed the district court's injunction and a civil contempt order imposed for defying the injunction because the court lacked subject matter jurisdiction to enter the injunction. *Tekkno Labs.*, 933 F.2d at 1099. In dicta, we said that the court's failure to make findings of fact and conclusions of law would also have justified vacatur of both orders had the district court not later issued an opinion setting forth its findings and conclusions. *Tekkno Labs.*, 933 F.2d at 1097. Putting aside the fact that the statement on which Warren relies is dicta of the clearest kind, it also has no relevance here because *Tekkno Labs.* involved civil and not criminal contempt. *See United States v. United Mine Workers*, 330 U.S. 258, 295 (1947) ("Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt; but we would, subject to any infirmities in the contempt proceedings or in the fines imposed, affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed.").

Having found that a binding order existed as to the appellants, we conclude that they are subject to the collateral bar doctrine, which states that "a party may not challenge a district court's order by violating it." *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995). Under this

doctrine, it is well settled that "persons subject to an injunctive order . . . are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980); *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (stating that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.").[6] Furthermore, it is equally well established that an order that is set aside on appeal may give rise to a charge of criminal contempt. *See United Mine Workers*, 330 U.S. at 294-95. Consequently, the fact that an order might have been subject to reversal is not a defense to a criminal contempt charge. *See Maness v. Meyers*, 419 U.S. 449, 458-59 (1975).

The bottom line is that the appellants could have appealed the extension of the TRO. They could have asked the district court to issue an order vacating the TRO. What they could not do, however, is disobey the Order without consequences.

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[6] Exceptions to the collateral bar doctrine lie where the order exceeded the district court's jurisdiction or where the order was transparently invalid. *Cutler*, 58 F. 3d at 832. Neither is available to appellants here, as the district court clearly had jurisdiction and the transparently invalid exception is only available to a party who has either made a good faith effort to obtain emergency relief from the appellate court "or who show[s] compelling circumstances . . . excusing the decision not to seek some kind of emergency relief." *Cutler*, 58 F. 3d at 832.

B. The Convictions Do Not Offend Due Process

Appellant Warren additionally challenges his conviction for criminal contempt on the ground that the TRO issued by Judge Arcara did not meet the demands of due process because it was ambiguous as to its temporal scope and its description of the prohibited conduct. These arguments are without merit. The TRO itself could not have been any clearer with respect to its intended duration, as it explicitly stated that it was to "remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for preliminary injunction." (TRO issued 4/15/99 at 18).

Nor did the inclusion of the so-called First Amendment clause create any confusion regarding what conduct was prohibited. That clause read:

> IT IS FURTHER ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution.

(TRO issued 4/15/99 at 16). While the clause may have been unnecessary, it did not make the Order's directives any less clear.[7] We therefore find that the appellants'

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[7] Appellant Warren relies on *United States v. Lanier*, 520 U.S. 259 (1997), for his contention that the so-called First Amendment clause rendered the Order ambiguous. In *Lanier*, the challenged statute, instead of describing the conduct it prohibited, criminalized the deprivation of "rights protected by the Constitution or laws of the United States." *Lanier*, 520 U.S. at 264. The question in *Lanier* was whether the defendant was afforded fair warning that the right to be free from sexual assault was a constitutional right and thus prohibited

(Continued on following page)

convictions for violating the TRO do not offend due process.

III. CONCLUSION

We have considered all of appellants' arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

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by the statute at issue. *Lanier* is not this case, as the Order itself specifically and unambiguously defined the prohibited conduct.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re Criminal Contempt Proceedings against Gerald Crawford and Michael Warren	DECISION AND ORDER Misc. Cr. 00-029A (Filed Aug. 17, 2001)

INTRODUCTION

On March 24, 2000, the government commenced the instant criminal contempt proceeding against defendants Gerald Crawford and Michael Warren by the filing of a "Notice of Criminal Contempt," pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. The Notice charges that on three dates in 1999, defendants committed criminal contempt, in violation of 18 U.S.C. § 401(3), by violating a temporary restraining order ("TRO") issued by this Court on April 15, 1999, in the underlying civil action, *People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, et al. v. Operation Rescue National, et al.*, 99-CV-209A (W.D.N.Y.) ("*Spitzer*"). The Court's TRO prohibited defendants and others from engaging in certain conduct outside reproductive health care facilities located within the Western District of New York. The Notice of Criminal Contempt alleges that defendant Warren violated the TRO on May 18, 1999, and that both defendants Warren and Crawford violated it on May 22 and July 14, 1999.

Defendants initially moved for dismissal of the criminal contempt charges, arguing, *inter alia*, that under rule 65(b) of the Federal Rules of Civil Procedure, the TRO had expired before the dates on which they are alleged to have

violated it. The Court denied the motion to dismiss in a Decision and Order filed February 27, 2001.[1] In the same Order, the Court limited the possible sentence in this case to six-months' imprisonment or a $5,000 fine.

A non-jury trial was held on June 5, 2001. Following the trial, the parties submitted proposed findings of fact and conclusions of law. Summations were held on August 2, 2001.

After considering the evidence adduced at trial, reviewing the submissions of the parties, and hearing summations from counsel, the Court finds defendants Crawford and Warren guilty beyond a reasonable doubt on all of the charges against them in the Notice of Criminal Contempt. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.

FINDINGS OF FACT

A. *Background of Spitzer Case, TRO and Contempt Proceeding*

On March 22, 1999, the plaintiffs in the *Spitzer* action, who include the People of the State of New York by Eliott Spitzer, Attorney General for the State of New York, several medical facilities and doctors who provide reproductive healthcare services, and organizations that advocate abortion rights, commenced that action by filing a complaint seeking relief under the Freedom of Access to

[1] The February 27, 2001 Decision and Order is hereby incorporated by reference.

Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, and New York law.[2] Along with the complaint, the plaintiffs filed a motion for a TRO and a preliminary injunction, asking the Court to establish limited buffer zones around reproductive healthcare facilities located within this District and otherwise preventing the defendants from engaging in illegal activities designed to disrupt access to those facilities.

The defendants in the instant criminal contempt proceeding, Gerald Crawford and Michael Warren, are named as defendants in the *Spitzer* action. At all relevant times, they were both represented in the civil case by attorney Mary Aramini.

On April 15, 1999, the Court issued a TRO enjoining the defendants and others from engaging in certain conduct outside reproductive healthcare facilities located within this District. Genesee Hospital and the Planned Parenthood clinic on University Avenue are both reproductive health care facilities located in Rochester, New York, and were specifically covered by the TRO. Paragraph 13(A) of the TRO prohibited the defendants from being present within a specified buffer zone in front of the Genesee Hospital. Similarly, paragraph 3(A) prohibited the defendants from being present within a specified buffer zone in front of the Planned Parenthood clinic.

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[2] There is a detailed discussion of the background of the *Spitzer* case in the Court's Decision and Order filed July 26, 2000, regarding the preliminary injunction in that case. The Court hereby incorporates by reference that Decision and Order and assumes familiarity therewith.

The TRO stated that it could be enforced by a motion for either criminal or civil contempt. It also stated at page 16 that:

> [N]othing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution[.]

(hereinafter referred to as the "First Amendment Provision").[3] The last paragraph of the TRO stated:

> IT IS FURTHER ORDERED that this Order shall remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction.

The Court provided notice and copies of the TRO to both defendants and their attorney on April 15, 1999.

At a status conference on April 29, 2001, attended by defendants' attorney, the Court reiterated that the TRO would continue to remain in effect until the preliminary injunction hearing was completed.

On August 6, 1999, *Spitzer* plaintiffs made an application for an Order to Show Cause as to why defendants Crawford and Warren should not be held in criminal and civil contempt for violating the TRO for acts they allegedly engaged in on May 18, May 22 and July 14, 1999. On August 12, 1999, the Court signed the Order to Show

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[3] The Court notes that the language in the First Amendment Provision tracks similar language in the FACE statute. *See* 18 U.S.C. § 248(d)(1).

Cause, directing that defendants Crawford and Warren appear on August 17, 1999. On August 17, 1999, the Court held a hearing on the Order to Show Cause and referred the matter to the United States Attorney's Office for the Western District of New York for investigation and possible prosecution for criminal contempt. The Court also assigned the Federal Public Defender's Office to represent the defendants.

B. ***May 18, 1999 Violation of TRO by Defendant Warren***

On May 18, 1999, defendant Warren was present at Genesee Hospital, within the buffer zone described in paragraph 13(A) of the TRO, demonstrating against abortion. *See* Joint Exhibit B.

C. ***May 22, 1999 Violation of TRO by Defendants Crawford and Warren***

On May 22, 1999, defendants Crawford and Warren were present at Genesee Hospital, within the buffer zone described in paragraph 13(A) of the TRO, demonstrating against abortion. *See* Government Exhibit 20.

D. ***July 14, 1999 Violation of TRO by Defendants Crawford and Warren***

On July 14, 1999, defendants Crawford and Warren were both present at the Planned Parenthood clinic on University Avenue, within the buffer zone described in paragraph 3(A) of the TRO, demonstrating against abortion. *See* Government Exhibit 34. Defendant Crawford was the first to arrive. He was within the buffer zone near the

driveway to Planned Parenthood. Rochester Police Officer Michael Prince approached Crawford and asked him to move across the street so that he would not be in violation of the TRO. Crawford responded by telling Officer Prince that because the TRO was issued by a federal court, it was not for the local police to enforce. Officer Prince then told Crawford that he was going to contact the United States Marshals, and Crawford replied that he wanted Prince to do so. Crawford also told Officer Prince that the TRO "was a temporary order, and that it had been more than fifteen days, and he didn't think it was a lawful or fair order, because being temporary, it should have an end to it." Trial Transcript ("Tr.") at 53-54. Crawford refused to leave the buffer zone.

Later, Rochester Police Lieutenant James Keenan and two other officers arrived at the scene. Lieutenant Keenan told defendant Crawford that he was in violation of the TRO and that he should move. Crawford responded that he was exercising his First Amendment right to free speech and was not going to move.

At some point, defendant Warren arrived at the scene and joined defendant Crawford inside the buffer zone.

Eventually, United States Marshall John McCaffrey and Deputy Marshall Scott Hopkins arrived at the scene. Deputy Hopkins read to the defendants the caption of the TRO, all the general provisions of the TRO, and the parts of the TRO that applied to the Planned Parenthood location.

Other persons protesting against abortion near the Planned Parenthood facility during this incident were standing on the other side of University Avenue, outside the buffer zone.

E. ***Findings Regarding Reliance-on-Advice-of-Counsel Defense***

At trial, the parties offered as a joint exhibit the grand jury testimony of defendants' attorney in the civil case, Mary Aramini, Ms. Aramini met with the defendants on May 1, 1999 regarding the TRO. Both before and at the meeting, she discussed with the defendants the restrictions contained in the TRO. She even drew for them a map of the buffer zones around the locations in Rochester. According to Ms. Aramini, defendants had received a copy of the TRO and understood the restrictions contained therein.

Ms. Aramini was present in Court on April 29, 1999 when the Court reiterated that the TRO would continue until completion of the preliminary injunction hearing. Two days later, at the May 1st meeting with her clients, Ms. Aramini told the defendants that the Court had extended the TRO, but that she "was not certain whether this was a valid extension," Joint Exhibit A at 10, and that it "had not made a lot of sense to [her]." *Id.* at 12. She explained to them her view that there was "some ambiguity" between the Court's extension of the TRO and the time limitations in Rule 65(b). *Id.* at 10. She told them that under the Rule, the TRO would expire on May 4, 1999 and that they would have a valid legal defense to any contempt action brought against them for conduct occurring after that date. On May 15 and May 21, 1999, and on numerous other occasions prior to the preliminary injunction hearing, Ms. Aramini discussed with the defendants the Court's extension of the TRO and their possible defense to any contempt action brought under the extended TRO.

At the May 1st meeting, Ms. Aramini also discussed with the defendants the First Amendment Provision in the TRO. Defendants asked Ms. Aramini whether holding a sign and praying were legitimate First Amendment activities and she said they were.

Despite her opinion that the TRO would not be enforceable after May 4, 1999, Ms. Aramini suggested to the defendants that they wait for some further action before demonstrating inside the buffer zones. Obviously, defendants declined to follow her advice.

F. *Defendants Acted Knowingly and Wilfully*

The Court finds a matter of fact that defendants' violations of the TRO were wilful. The evidence shows that defendants were aware of and understood the restrictions in the TRO. The evidence also shows that defendants were aware of and understood the fact that the Court extended the TRO until resolution of the preliminary injunction motion. The TRO itself clearly and unambiguously stated that it was to continue until further order of the Court or until resolution of the preliminary injunction motion. The Court reiterated its extension at the April 29th status conference. On May 1st, Ms. Aramini told the defendants that the Court had extended the TRO until completion of the preliminary injunction hearing.

Although Ms. Aramini also told the defendants on May 1st that she disagreed with the Court regarding its authority to extend the TRO, that disagreement cannot be

used by the defendants to negate a finding of wilfulness.[4] Defendants' disobedience of the TRO resulted from their disagreement with the Court regarding a point of law, not from any unawareness of the fact that the TRO had been extended. When one disagrees, one of course disagrees wilfully. And when one's disobedience of a court order is the result of disagreeing with it, the disobedience, too, is wilful.

CONCLUSIONS OF LAW

A. *Law of Contempt*

The purpose of providing the United States courts with the authority to punish disobedience or resistance to their lawful orders is to vindicate the authority of the courts and to protect the courts in the conduct of their business. The foundation of the criminal contempt power is the need to protect the judicial process from wilful impositions, particularly those designed to obstruct the normal machinery of justice. Sand, Siffert, Loughlin & Reiss, *Modern Federal Jury Instructions,* Instruction No. 20-11.

In order to sustain its burden of proving the charge of contempt, the government must establish beyond a reasonable doubt each of the following elements: (1) that the Court issued an order prohibiting the defendants from engaging in certain conduct; (2) that the defendants disobeyed or disregarded the order; and (3) that the

[4] As discussed below, good faith reliance on advice of counsel is not a valid defense to a charge of criminal contempt.

defendants acted knowingly and wilfully. *See id.* at Instruction No. 20-12.

The first element of the offense of contempt is that the Court issued an order that applied to the defendants. For the order to be enforceable by criminal contempt, it must be clear and definite. If the evidence shows that the Court clearly and definitely ordered the defendants not to conduct themselves as charged in the Notice of Criminal Contempt, then the first element of the offense is satisfied. *Id.* at Instruction No. 20-13.

The second element of the offense is that the defendants disobeyed or disregarded the Court's order. Court orders must be precisely and promptly obeyed. If the evidence establishes that the defendants failed to comply with the TRO's prohibition against them being present within the buffer zone in front of Genesee Hospital and/or Planned Parenthood, then the second element of the offense is satisfied. *Id.* at Instruction No. 20-14.

The third element of the offense of contempt is that defendants acted knowingly and wilfully. Contempt means a willful disregard or disobedience of public authority. In order to find a defendant guilty of contempt, the evidence must establish that defendant acted knowingly and with the specific intent to disregard or disobey the order of the court. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, accident, mistake, or carelessness. If the defendants understood the TRO and consciously refused to obey that order, then they acted knowingly and wilfully. *Id.* at Instruction No. 20-15.

Good faith is a defense to the offense of contempt only when the defendant has made a reasonable effort to comply with the court order but has failed because of the

indefiniteness of the order or some other inability to do so. It is not a defense when the defendant has refused to comply with the order he is charged with violating. *Id.* at Instruction No. 20-17.

Good faith reliance on advice of counsel is not a defense to a charge of criminal contempt, though it may be considered as a mitigating factor in the punishment to be imposed in the event of conviction. *United States v. Remini,* 967 F.2d 754, 757 (2d Cir. 1992).

B. *Application of the Law to the Facts*

The Court finds that the government has proven the following facts beyond a reasonable doubt: (1) that on April 15, 1999, the Court issued a TRO prohibiting the defendants from engaging in certain conduct outside Genesee Hospital and the Planned Parenthood clinic; (2) that defendants had notice of the TRO prior to the dates charged in the Notice of Criminal Contempt; (3) that on May 18, 1999, defendant Warren was present within the buffer zone in front of Genesee Hospital, in violation of paragraph 13(A) of the TRO; (4) that on May 22, 1999, defendants Crawford and Warren were present within the buffer zone in front of Genesee Hospital, in violation of paragraph 13(A) of the TRO; (5) that on July 14, 1999, defendants Crawford and Warren were present within the buffer zone in front of the Planned Parenthood clinic, in violation of paragraph 3(A) of the TRO; and (6) that defendants' violations of the TRO were knowing and wilful.

Defendants raise several defenses to the criminal contempt charges. The Court shall address those defenses *seriatim.*

1. *TRO Expired Before Dates of Alleged Contemptuous Conduct*

Defendants argue that they cannot be held in criminal contempt for violating the TRO because under Rule 65(b), the TRO expired before the dates they are alleged to have violated it. This argument was already raised and rejected in a pretrial motion to dismiss the Notice of Criminal Contempt. *See* February 27, 2001 Decision and Order.

2. *Good Faith Reliance on Advice of Counsel*

Defendants argue that they did not wilfully violate the TRO as they were relying on their counsel's advice that the TRO expired on May 4, 1999. The Court finds this defense without merit.

As stated above, the Second Circuit has held that good faith reliance on advice of counsel is not a defense to criminal contempt. *See Remini,* 967 F.2d at 757. Further, the evidence shows that defendants, in fact, rejected the advice of their counsel, who suggested that they refrain from entering the buffer zones until some further action was taken.

3. *"Ambiguity" Between the TRO and Rule 65(b)*

Defendants argue that there was an "ambiguity" between the time limits regarding TROs contained in Rule 65(b) and the Court's extension of the TRO in this case, and that their "subjective belief" that the TRO expired under the Rule negates any finding that they wilfully violated the TRO. The Court finds this argument without merit for two reasons.

First, this argument is merely an extension of defendants' goodfaith-reliance-on-advice-of-counsel defense. Their supposed "subjective belief" that the TRO expired came from the advice they received from their counsel. As already stated, advice of counsel is not a defense to criminal contempt.

Second, defendants' supposed "subjective belief" that the TRO had expired was really a disagreement with the Court regarding the Court's legal authority to extend the TRO. As stated above, defendants were well aware of the fact that the Court extended the TRO until completion of the preliminary injunction hearing. Under the collateral bar doctrine, even if defendants believed that the extension was beyond the Court's legal authority, they were required to obey the TRO until it was modified or vacated through the judicial process; they were not free to violate the order and then assert its possible invalidity as a defense to a charge of criminal contempt. *See* February 27, 2001 Decision and Order at 25-35.

4. *"Ambiguity" Created by the First Amendment Provision*

Defendants assert that the First Amendment Provision of the TRO created an ambiguity in the TRO and that based on that ambiguity, they cannot be held in criminal contempt. As stated above, the First Amendment Provision of the TRO provided:

> [N]othing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution[.]

Defendants argue that based on this language, they could have believed, in good faith, that their conduct, i.e., peaceful demonstration on a public sidewalk, did not violate the TRO. Thus, according to defendants, there can be no finding that they wilfully violated the order. The Court finds this argument without merit.

> Willfulness, for the purpose of criminal contempt, does not exist where there is a [g]ood faith pursuit of a plausible though mistaken alternative. To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible. The defendant may not avoid criminal contempt by twisted interpretations or tortured constructions of the provisions of the order. . . . [A] defendant if he has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order. While a defendant is, of course, not required to seek such a clarification, a failure to do so when combined with actions based on a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree.

United States v. Greyhound, 508 F.2d 529, 532 (7th Cir. 1974) (internal citations and quotations omitted).

Defendants' proposed interpretation of the First Amendment Provision, so as to allow demonstrating within the buffer zones, is completely contrary to the background, purpose and express language of the TRO. The TRO was issued based on defendants' past and possible future conduct at the clinics. The whole purpose behind the TRO was to create buffer zones in front of the clinics into which the defendants would be prohibited from

entering. Paragraph 13(A) expressly prohibited defendants from "demonstrating" or even "being present" within the buffer zone e in front of Genesee Hospital. Likewise, paragraph 3(A) expressly prohibited defendants from "demonstrating" or "being present" within the buffer zone in front of the Planned Parenthood clinic. When viewed in this context, defendants' proposed interpretation of the First Amendment Provision is implausible and could not be adopted in good faith. The only reasonable and logical way to interpret the First Amendment Provision without eviscerating the entire intent of the TRO, and paragraphs 13(A) and 3(A) in particular, is that the First Amendment Provision applied to defendants' activities outside of the buffer zones. It would make no sense to interpret the order to mean that the defendants were prohibited from "demonstrating" or "being present" within the buffer zones, yet at the same time could enter the buffer zones to exercise their First Amendment rights.[5] Defendants never petitioned the Court for a clarification or construction of the First Amendment Provision.

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[5] The Court notes that it included a similar First Amendment Provision in the preliminary injunction it subsequently issued in the *Spitzer* case. There, the Court added the words "except as set forth herein" as a preface to the Provision. However, even without the preface, an interpretation of the First Amendment Provision that would allow the defendants to enter the buffer zones for the purposes of exercising their First Amendment rights would run so clearly contrary to the other provisions of the order that such an interpretation could not be relied upon in good faith.

CONCLUSION

Based upon the evidence presented at trial, and for the reasons stated herein, the Court finds beyond a reasonable doubt that: (1) on May 18, 1999, defendant Michael Warren knowingly and wilfully disobeyed the TRO issued by this Court on April 15, 1999, by being present in the buffer zone in front of Genesee Hospital, in violation of paragraph 13(A) of the TRO and 18 U.S.C. § 401(3); (2) on May 22, 1999, defendants Gerald Crawford and Michael Warren knowingly and wilfully disobeyed the TRO by being present in the buffer zone in front of Genesee Hospital, in violation of paragraph 13(A) of the TRO and 18 U.S.C. § 401(3); and (3) on July 14, 1999, defendants Gerald Crawford and Michael Warren knowingly and wilfully disobeyed the TRO by being present in the buffer zone in front of the Planned Parenthood clinic, in violation of paragraph 3(A) of the TRO and 18 U.S.C. § 401(3). Accordingly, the Court finds defendants guilty of all the charges against them in the Notice of Criminal Contempt.

Sentencing for defendant Crawford shall be held on November 28, 2001 at 12:30 p.m. Sentencing for defendant Warren shall be held on November 29, 2001 at 12:30 p.m. The initial presentence reports shall be completed by October 15, 2001. The parties' Statements with Respect to Sentencing Factors and/or objections and motions shall be filed by November 5, 2001. Responses to any objections or motions shall be filed by November 14, 2001. The final presentence reports shall be completed by November 21, 2001. Letters in support of the defendants and/or sentencing memoranda shall be submitted to the Court's chambers by November 26, 2001. The United States Probation Office shall be provided with a copy of all submissions.

IT IS SO ORDERED.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: August 17, 2001

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

In re Criminal Contempt Proceedings against Gerald Crawford and Michael Warren

DECISION AND ORDER
Misc.Cr. 00-029A

(Filed Feb. 27, 2001)

INTRODUCTION

On March 24, 2000, the government commenced the instant criminal contempt proceeding against defendants Gerald Crawford and Michael Warren by the filing of a "Notice of Criminal Contempt," pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. The Notice charges that on three dates in 1999, defendants violated a temporary restraining order ("TRO") issued by this Court on April 15, 1999, in the underlying civil action, *People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, et al. v. Operation Rescue National, et al.*, 99-CV-209A (W.D.N.Y.) ("*Spitzer*"), in violation of 18 U.S.C. § 401(3). The Court's TRO prohibited defendants from engaging in certain conduct outside reproductive health care facilities located within the District. The Notice of Criminal Contempt alleges that defendant Warren violated the TRO on May 18, 1999, and that both defendants Warren and Crawford violated it on May 22 and July 14, 1999.

The case was initially referred to Magistrate Judge Carol E. Heckman, pursuant to Rule 21.1 of the Local Rules of Criminal Procedure for the United States District Court for the Western District of New York and 28 U.S.C. § 636(b)(1). Upon Magistrate Judge Heckman's retirement

from the Bench on May 1, 2000, all of her cases were referred to Magistrate Judge H. Kenneth Schroeder, Jr.

On July 5, 2000, defendants filed a joint motion to dismiss the criminal contempt proceedings on two grounds: (1) that pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, the TRO expired before the dates the defendants are alleged to have violated it; and (2) that defendants' actions on the dates in question were protected by the First Amendment. Defendants also moved for change of venue and for recusal of this Court. On July 20, 2000, the government filed a response opposing defendants' motions.

On September 29, 2000, Magistrate Judge Schroeder filed a Report and Recommendation, recommending that the defendants' motion to dismiss the criminal contempt proceedings be granted. Magistrate Judge Schroeder found that the Court's April 15, 1999 TRO expired, pursuant to Rule 65(b), on May 14, 1999. Thus, according to Magistrate Judge Schroeder, because the TRO was no longer in existence on the dates the defendants are alleged to have violated it, they cannot be held in criminal contempt. Magistrate Judge Schroeder did not address defendants' First Amendment argument. In light of his recommendation that the contempt action be dismissed, Magistrate Judge Schroeder denied defendants' motions for change of venue and recusal, without prejudice.

On October 19, 2000, the government filed objections to the Magistrate Judge's Report and Recommendation. Also on October 19th, the plaintiffs in *Spitzer* moved to appear as *amici curiae* in this action. Plaintiffs filed *amici* briefs on October 26, 2000. On November 6, 2000, defendants filed a joint opposition to plaintiffs' requests to

appear as *amici*. On November 8, 2000, the Court granted plaintiffs' motions to appear as *amici*. Defendants filed responses to the government's objections and the *amici* briefs on December 8 and 11, 2000. The government and the *amici* filed reply briefs on January 8, 2001.

Oral argument on the objections was held on January 18, 2001. At oral argument, defendants made several oral motions requesting relief. First, defendants moved the Court to recuse itself from the case. Next, defendants moved for dismissal of the case because *amici* status was improperly granted to the plaintiffs in the *Spitzer* action. In the alternative, defendants requested that both the *amici* and the United States Attorney be disqualified from the case.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and Recommendation in this case, and after reviewing the submissions and hearing argument from the parties, the Court rejects the proposed findings and recommendation of the Magistrate Judge and denies defendants' motion to dismiss the criminal contempt proceeding. The Court also (1) denies defendants' motions to disqualify the *amici* and the United States Attorney, (2) denies defendants' motion for recusal, and (3) denies defendants' motion for change of venue.

BACKGROUND

On March 22, 1999, the plaintiffs in the *Spitzer* action, who include the People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York,

several medical facilities and doctors that provide reproductive health care services, and organizations that advocate abortion rights, commenced that action by filing a complaint seeking relief under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and New York law.[1] Along with the complaint, the plaintiffs filed a motion for a TRO and a preliminary injunction, asking the Court to establish limited buffer zones around reproductive health care facilities located within this District and otherwise preventing the 68 named-defendants from engaging in illegal activities designed to disrupt access to those facilities. The defendants in the instant criminal contempt proceeding, Gerald Crawford and Michael Warren, are named-defendants in the *Spitzer* action.

Practically speaking, the *Spitzer* action is simply a continuation of a previous civil action filed in this Court in 1990. *See Pro-Choice Network of W.N.Y. v. Project Rescue W.N.Y.*, 799 F. Supp. 1417 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 377 (2d Cir. 1995), *aff'd in relevant part, sub nom., Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997) ("*Pro-Choice*"). Of the 68 named-defendants in the *Spitzer* action, fourteen of them, including defendant Crawford, were also named-defendants in the *Pro-Choice* case.

On March 24, 1999, the Court granted plaintiffs' application in the *Spitzer* case for an expedited hearing on

[1] There is a detailed discussion of the background of the *Spitzer* case in the Court's Decision and Order, filed July 26, 2000, regarding the preliminary injunction in that case. The Court hereby incorporates by reference that Decision and Order and assumes familiarity therewith.

their motion for a TRO and scheduled a hearing for April 8, 1999. The Court gave defendants until April 6, 1999 to respond to the TRO motion.

On April 6 and 7, 1999, defendants submitted various opposition papers and memoranda of law in response to the plaintiffs' TRO motion. Most of the defendants submitted affidavits contesting the factual allegations made against them in the complaint and in plaintiffs' papers.[2] Many of the defendants also moved for dismissal of the complaint on various grounds, including lack of personal jurisdiction and improper service of process.

On April 8, 1999, the Court commenced the TRO hearing. The hearing continued over three days, April 8th, 9th and 12th. Most of the defendants were represented at the hearing by counsel, but several defendants either appeared *pro se* (including defendants Crawford and Warren) or made no appearance at all. At the hearing, defendants vigorously contested plaintiffs' TRO motion on both factual and legal grounds. As stated, several of the defendants submitted affidavits denying the factual allegations contained in plaintiffs' complaint and motion papers. The parties also presented evidence in the form of photographic and video evidence. One of the named-defendants, Renee Riddle, testified on her own behalf regarding her intent not to appear at any upcoming anti-abortion demonstrations. Her counsel moved orally for her dismissal and the Court reserved decision. At the close of

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[2] Some of the affidavits submitted by the defendants were received by the Court prior to or during the TRO hearing, but were not actually filed until after the hearing.

the proceedings on April 12, 1999, the Court gave the parties until the close of business on April 13, 1999 to file any supplemental papers in support of their respective positions, at which time the record would be deemed closed. During the hearing, the Court also set a briefing schedule for resolution of the various motions to dismiss filed by the defendants.

The parties filed additional affidavits on April 13 and 14, 1999. Many of these affidavits were submitted on behalf of defendants and again disputed the factual allegations contained in the complaint and in plaintiffs' moving papers.

On April 15, 1999, the Court issued a TRO, enjoining defendants from engaging in certain conduct outside reproductive health care facilities located within the District. The TRO stated that it could be enforced by a motion for either criminal or civil contempt. The last paragraph of the TRO stated:

> IT IS FURTHER ORDERED that this Order shall remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction.

The Court included this language in the TRO regarding its duration because the Court was aware, at the time it issued the TRO, that based on the large number of defendants in the case, the numerous disputed issues of fact raised in the parties' affidavits that would have to be resolved at the preliminary injunction hearing,[3] the

[3] *See Davis v. New York City Housing Auth.*, 166 F.3d 432, 437-38 (2d Cir. 1999) ("[W]hile affidavits may be considered on a preliminary

(Continued on following page)

necessary resolution of the pending motions to dismiss, the Court's experience at the TRO hearing, the Court's calendar,[4] and the Court's past experience in the *Pro-Choice* case, the preliminary injunction hearing would be lengthy and the Court probably would not be able to complete the hearing and resolve the motion for preliminary injunction within the time limitations in Rule 65(b). Also on April 15th, the Court issued an Order setting the preliminary injunction hearing to commence on May 4, 1999. The Court set a pre-hearing conference for April 29, 1999.

Prior to the pre-hearing conference scheduled for April 29, 1999, the Court was contacted by counsel for the parties, who informed the Court that they were engaged in serious settlement discussions and that there was a possibility that the case could settle. The Court therefore converted the pre-hearing conference for April 29th into a status conference.

At the April 29th status conference, defendants Warren and Crawford, who were previously proceeding *pro se,* appeared for the first time through counsel. Counsel for

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injunction motion, motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact. When a factual issue is disputed, oral testimony is preferable to affidavits.") (citations omitted); *Forts v. Ward,* 566 F.2d 849, 851 (2d Cir. 1977) ("Generally, of course, a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' This is particularly so when the judge without holding an evidentiary hearing, resolves the bitterly disputed facts in favor of the party who has the burden of establishing his right to preliminary relief.") (citations omitted); *Dopp v. Franklin Nat'l Bank,* 461 F.2d 873, 879 (2d Cir. 1972).

[4] The Court conducted a criminal trial from April 14, 1999 to April 22, 1999 and had several other trials scheduled.

the parties advised the Court that the parties had entered into settlement discussions and wished to continue those discussions rather than starting the preliminary injunction hearing. In that regard, the plaintiffs informed the Court that they had already agreed to dismissal of four of the defendants. In order to accommodate the parties' settlement discussions, the Court adjourned the commencement of the preliminary injunction hearing to May 25, 1999. The Court reiterated that the TRO would continue to remain in effect until the preliminary injunction hearing was completed. Even though all the defendants agreed to postponement of the preliminary injunction hearing and the continuation of the settlement discussions, they all objected to the continuation of the TRO.

On May 21, 1999, several defendants, including defendants Crawford and Warren, moved to sever the claims against them and to have those claims transferred to a judge in Rochester, New York or, in the alternative, to sever the claims against them for a separate proceeding and trial before this Court.

Prior to the scheduled hearing on May 25, 1999, the Court was contacted by counsel and told that a possible settlement had been reached by some of the defendants. Accordingly, the Court did not commence the hearing on May 25th, but instead held a status conference. At the conference, counsel informed the Court that several of the defendants had agreed to settle the case and be bound by the TRO and any further injunctive relief granted by the Court. Counsel also indicated that a number of other defendants, while they did not wish to contest the case, did not want to enter into any type of settlement or stipulation, as a matter of principle. Counsel for those defendants informed the Court that they would simply default if

required to file an answer. Because it appeared that a substantial number of the defendants were going to either settle or default, thereby reducing the amount of resources necessary for a preliminary injunction hearing, the Court decided to delay the preliminary injunction hearing until the settlement and default judgments could be finalized. The Court stated:

> It's my understanding that a number of the defendants may be defaulting, a number of the defendants may be agreeing to stipulation, a number of the defendants may be whatever. And it would seem that their involvement as far as any future hearings are concerned, at least many of the defendants, may be unnecessary. But it's going to take some time to work all this out. And it seems to me that would be a waste of judicial resources to be conducting hearings when many of the defendants will ultimately either be defaulting, or they will be stipulating to the injunction. It would be wasting the Court's time as well as attorney time, and would serve no useful purpose.

Spitzer, Item No. 184 at 3-4. The Court then tried to schedule a new date for the preliminary injunction hearing that was convenient to all the parties. There was much disagreement among counsel, however, as to when the hearing should begin. Plaintiffs and some of the defendants wanted the hearing to start immediately after the issues regarding the settling and defaulting defendants were finalized, while other defendants wanted it adjourned until September or even the following January. The Court then set the date of July 28, 1999 for the hearing. The Court also established a schedule for finalizing the settlement discussions and any default judgments,

and set a briefing schedule for resolution of any outstanding motions. The extension of the TRO was not discussed at the May 28th status conference.

On June 16, 1999, the Court issued a 24-page Decision and Order denying all of defendants' outstanding motions. *See People of the State of N.Y. ex rel. Spitzer v. Operation Rescue Nat.*, 69 F. Supp. 2d 408 (W.D.N.Y. 1999).

Due to a civil jury trial that went longer than expected and a delay in finalizing some of the settlements and resolving all the default judgments, the preliminary injunction hearing was postponed from July 28, 1999 to August 3, 1999. By the time the hearing started on August 3, 1999, 45 of the original 68 defendants had either settled, defaulted or been dismissed from the case.

The preliminary injunction hearing lasted 23 days and spanned from August 3 through September 29, 1999. The Court heard testimony from 40 witnesses.

On August 6, 1999, during the preliminary injunction hearing, the plaintiffs made an application for an Order to Show Cause as to why defendants Crawford and Warren should not be held in criminal and civil contempt for violating the Court's April 15, 1999 TRO for acts they allegedly engaged in on May 18, May 22 and July 14, 1999. On August 12, 1999, the Court signed the Order to Show Cause, directing that those defendants appear on August 17, 1999. On August 17, 1999, the Court held a hearing on the Order to Show Cause and referred the matter to the United States Attorney's Office for the Western District of New York for investigation and possible prosecution for criminal contempt.

At the conclusion of the preliminary injunction hearing, the Court set a briefing schedule for submission by the parties of proposed findings of fact and conclusions of law. The Court required that a transcript of the hearing be prepared and that the parties' proposed findings of fact cite to specific transcript pages. The briefing schedule was extended several times pursuant to requests of the parties. On July 26, 2000, the Court issued a 125-page Decision and Order outlining its findings of facts and conclusions of law and granting plaintiffs' motion for a preliminary injunction.

DISCUSSION

I. An Enforceable Order Existed

Defendants contend that the TRO issued by the Court on April 15, 1999, and extended on April 29, 1999, automatically expired on May 14, 1999, pursuant to the 20-day time limit for TRO's contained in Rule 65(b).[5] Thus, defendants argue, because the TRO expired as a matter of law before the dates of their alleged violations, the criminal contempt charges against them must be dismissed. In other words, they could not have violated an order that had ceased to exist.

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[5] Rule 65(b) provides:

> Every temporary restraining order provided without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

In support of their position, defendants rely primarily upon the Supreme Court's decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County,* 415 U.S. 423 (1974). In *Granny Goose,* a state court issued a TRO to enjoin a local union from striking. Two days later, the case was removed to federal court. The union moved to dissolve the TRO. After a hearing, the district court denied the union's motion. The union went on strike some months later. The district court held the union in contempt for violating the state court TRO, which it held was still in effect at the time of the strike. The Ninth Circuit reversed and the Supreme Court affirmed the appellate court.

In reaching its decision, the Supreme Court first held that the federal statute which provides that all state court injunctions remain in full force and effect after removal until dissolved or modified by the district court, 28 U.S.C. § 1450, did not override the time limitations for TRO's in Rule 65(b). Thus, the Court explained, once a case is removed to federal court, any TRO issued by the state court remains in effect no longer than the time limitations in Rule 65(b). The Court then proceeded to apply the Rule 65(b) time limitations to the state court TRO at issue. The Court found that because the TRO was silent on its face as to its duration and the district court had neither extended the TRO or supplanted it with a preliminary injunction after the case was removed, the TRO expired after ten days pursuant to Rule 65(b), long before the alleged contemptuous conduct. Thus, the Court concluded, the union did not violate the TRO when it resumed its strike because the TRO was no longer in effect at that time. The Court stated:

> [O]ne basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits ... It would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b). Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued. Since neither § 1450 nor the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted that order into a preliminary injunction, no order was in effect on [the date of the strike], over six months after the temporary restraining order was issued. There being no order to violate, the District Court erred in holding the Union in contempt ....

Id. at 444-45 (footnotes omitted).

Defendants' reliance on *Granny Goose* is misplaced as they ignore a key factual, and legally significant, distinction between that case and this case. In *Granny Goose,* the TRO at issue was silent on its face as to its intended duration and the district court never ordered that it be extended beyond the time limits in Rule 65(b). Here, in contrast, the Court expressly extended the TRO beyond the 20-day time period in Rule 65(b). The Court stated clearly and unequivocally in the TRO that it was to remain in effect until resolution of the plaintiffs' motion for preliminary injunction. The Court reiterated this extension at the April 29, 1999 status conference. This is not a case like *Granny Goose* where the party being enjoined was left to guess at the intended duration of the TRO.[6] The Supreme Court and the appellate courts have held that where, as here, a district court expressly extends a TRO issued after notice and a hearing beyond the statutory 20-day limit in Rule 65(b), the TRO does not cease to exist after the 20 days have expired, but instead becomes an enforceable preliminary injunction subject to appellate review.[7] *See, e.g., Sampson v. Murray,* 415 U.S. 61, 87-88,

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[6] Defendants' reliance on *Republic of Philippines v. Marcos,* 1987 WL 28670 (S.D.N.Y. Dec. 14, 1987), is also misplaced because the TRO in that case was not extended to any date beyond the Rule 65(b) time periods. Instead, the issue in that case was the proper calculation of the ten-day periods under the Rule. Because there were ambiguities regarding the proper calculation of effective period of the TRO, the district court declined to hold the defendants in contempt.

[7] Some of the *amici* argue that the time limits contained in Rule 65(b) apply only to *ex parte* TROs, and because the TRO in this case was issued after notice and a hearing, the time limits in the Rule simply do not apply here. Although Rule 65(b), on its face, refers only to *ex parte* TROs, the Second Circuit has held that the time limits in the Rule apply even if the TRO was issued upon notice and a hearing. *See*

(Continued on following page)

(1974); *Levine v. Comcoa, Ltd.*, 70 F.3d 1191 (11th Cir. 1995), *cert. denied*, 519 U.S. 809 (1996); *Pan Am. World Airways, Inc. v. Flight Engineers' Int'l Ass'n, PAA Chapter, AFL-CIO*, 306 F.2d 840, 843 (2d Cir. 1962).

In *Sampson*, which was decided only a few weeks before *Granny Goose*, a government employee sought a TRO against her dismissal from employment as a probationary employee. The district court granted the TRO. Later, after an adversary hearing at which the government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, the district court ordered the TRO continued until the witness appeared. The government appealed.

In considering the issue of appellate jurisdiction over the TRO, the Supreme Court wrote:

> A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore, we view the order at issue here as a preliminary injunction.

Pan Am. World Airways, Inc. v. Flight Engineers' Int'l Ass'n, PAA Chapter, AFL-CIO, 306 F.2d 840, 842 (2d Cir. 1962).

Sampson, 415 U.S. at 86-88. The Court then went on to examine the merits of the case to determine whether a preliminary injunction should have been granted. Thus, under *Sampson,* a TRO issued after notice and a hearing, and extended past the time limits in Rule 65(b) becomes an appealable preliminary injunction.

The Supreme Court's decision in *Sampson* was presaged by the Second Circuit's decision in *Pan Am.* In *Pan Am.,* the district court issued a TRO enjoining the defendant union from striking. The district court continued the TRO from time to time past the 20-day limitation period in Rule 65(b). The union appealed.

In considering the issue of the appealability of the TRO, the Second Circuit stated:

> There is no statutory authority for the indefinite, successive extensions of temporary restraining orders . . . Appellee argues that the time limits set forth in Rule 65(b) . . . are applicable only to situations where the temporary restraining order was issued *ex parte* . . . The fact that notice is given and a hearing held cannot serve to extend indefinitely beyond the period limited by the Rule the time during which a temporary restraining order remains effective. The statute contemplates that notice and a hearing shall result in an appropriate adjudication, i.e. the issuance or denial of a preliminary injunction, not an extension of the temporary stay. The purpose of a temporary restraining order is to preserve an existing situation *in statu quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. Such an order is necessarily limited to a very brief period because what may later prove to be a right of the

> party who is restrained is suspended before even a tentative adjudication as to that right has been had. . . . It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protected provisions is the limitation on the time during which such an order can continue to be effective. It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions. 28 U.S.C. § 1292(a)(1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued without a preliminary adjudication of the basic rights involved would completely defeat the purpose of this provision. We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. § 1292(a)(1).

Pan Am., 306 F.2d at 842-43 (citations and footnotes omitted). As in *Sampson*, the Second Circuit then went on to examine the merits of the injunction that was issued by the district court.

The distinction between the situation present in *Sampson* (and this case) and the situation present in *Granny Goose* was also presaged by the Second Circuit in *Pan Am.* In footnote 4 of *Pan Am.*, the Second Circuit distinguished its case from certain other cases where appellate courts had refused to review TROs. *Id.* at 843 n.

4. The Second Circuit explained that in those other cases, the courts found that the TROs at issue had expired by virtue of the Rule 65(b) limitations and, therefore, because there was no existing order to review, the appeals were dismissed as moot. In contrast, in *Pan Am.*, the district court had extended the TRO beyond the 20-day period, thus converting the TRO into an appealable preliminary injunction.

Thus, under *Sampson* and *Pan Am.*, where a district court issues a TRO following notice and a hearing, and then extends the TRO beyond the 20-day limitation in Rule 65(b), the TRO does not cease to exist after 20 days, but instead becomes an appealable preliminary injunction.

Defendants argue that the conversion of an indefinitely extended TRO into a preliminary injunction under *Sampson* and *Pan Am.* is only for purposes of appeal, conferring jurisdiction on the appellate court for the sole purpose of voiding the invalidly extended TRO. This argument is inconsistent, however, with *Sampson* and *Pan Am.* In those cases, after holding that the extended TRO converted into a preliminary injunction and was therefore appealable, the Courts went on to address the substantive merits of the preliminary injunctions at issue. By reviewing the merits, the Courts implicitly held that the TRO turned preliminary injunction was still a valid restraining order.[8] Otherwise, the review on the merits would have

[8] In fact, in *Sampson*, the Supreme Court noted that the extended TRO "continue[d] in effect" at the time of the Court's decision. *Sampson*, 415 U.S. at 67.

amounted to nothing more than an advisory opinion regarding an order that no longer existed.

The bottom line is that a preliminary injunction is a preliminary injunction; if it "exists" for purposes of appeal, then it also "exists" for purposes of having to be obeyed. It would make no legal or rational sense to have an injunction that is appealable, but at the same time unenforceable because it no longer exists. Under *Sampson* and *Pan Am.*, a TRO issued after notice and a hearing and extended beyond 20 days becomes a preliminary injunction. As such, it continues to command adherence until it is modified or reversed through an orderly judicial process.

The case most on point with the instant case is not *Granny Goose,* but the Eleventh Circuit's decision in *Levine,* 70 F.3d at 1191. In *Levine,* the Securities and Exchange Commission (the "SEC") obtained an *ex parte* TRO that froze the defendant corporation's assets. The district court then commenced two days of hearings on the SEC's motion for a preliminary injunction, at which attorney Grossman appeared for the defendant corporation. At the hearing, the district court informed the parties that its TRO would be extended until it ruled on defense motions and the motion for a preliminary injunction. Grossman declined to consent to the extension of the TRO. Despite the district court's extension of the TRO, on the 21th day after its issuance, Grossman decided to treat the TRO as having expired and transferred the defendant corporation's assets into his law firm account in direct contravention of the TRO. He was held in contempt and appealed.

Grossman's grounds for appeal were exactly the same as those asserted by the defendants in this case. He relied

on *Granny Goose* to argue that despite the district court's extension of the TRO, it automatically expired after 20 days under Rule 65(b). Thus, according to Grossman, no order existed for him to violate.

The Eleventh Circuit rejected Grossman's argument. The court found that because there had been a hearing on the preliminary injunction motion and appellate review of the extended TRO was therefore available under *Sampson,* the case before it was "materially different from *Granny Goose.*" *Id.* at 1193 n. 8. The court therefore followed *Sampson's* holding that a TRO extended beyond the Rule 65 time limits should be treated as a preliminary injunction. *Id.* at 1193. The court saw "no good reason" to limit the *Sampson* rule – that an extended TRO becomes a preliminary injunction – to one of appellate jurisdiction only. *Id.* at 1193 n. 8. Accordingly, the court held that the TRO at issue "became a preliminary injunction when [it], as orally extended by the district court, went beyond the time permissible under Rule 65. Thus, the proper course of conduct for Grossman was to treat the TRO as an erroneously granted preliminary injunction and to appeal." *Id.* at 1193 (footnote and citation omitted). The court concluded that because Grossman did not appeal the injunction, but instead violated it, he was properly held in contempt.

The Eleventh Circuit noted that none of the concerns underlying Rule 65's time limits on TROs were implicated by its ruling.

> Two concerns about TROs are reflected in the case law and in Rule 65. First, restrained parties often have no opportunity for a hearing and may not know precisely what conduct is prohibited. Second, a restrained party may not obtain appellate review of a TRO. Our holding respects both

> these concerns; Grossman and Grossman's client had the opportunity to contest the preliminary injunction (and had previous notice of the enjoined conduct) and also could have obtained appellate review of the injunction.

Id. at 1193 n. 8.

Here, as in *Levine,* the defendants had notice and an opportunity to contest the issuance of the TRO at an extensive TRO hearing. Further, the TRO was expressly extended by the Court until resolution of the preliminary injunction motion. The extended TRO was therefore appealable under *Sampson* as a preliminary injunction. As such, the proper course of conduct for defendants was to treat the TRO as an erroneously granted preliminary injunction and to appeal it.[9] They were not free to violate it under the theory that it expired after 20 days.[10] *See also Casa Editrice Bonechi, S.R.L. v. Irving Weisdorf & Co.,* 1995 WL 731633 (S.D.N.Y. Dec. 8, 1995) (holding that defendant may be charged with contempt for violating a TRO issued after notice and hearing which was extended beyond the Rule 65 time limits).

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[9] Defendants' attempt to distinguish *Levine* based on the fact that the alleged contemnor in that case was a lawyer rather than a layperson is unavailing for two reasons: (1) the Court's extension of the TRO in this case was clear and unequivocal so that even a layperson would have understood that the TRO was still in effect; and (2) defendants were represented by counsel in this case and have made no claim that counsel somehow misadvised them that the TRO had expired.

[10] The Court accepts that where there has been no notice or hearing, a TRO continued past the Rule 65 time limits would expire pursuant to the Rule.

II. Collateral Bar Doctrine

Because the TRO in this case still existed, albeit as a preliminary injunction, after the expiration of the time limits in Rule 65(b), the defendants were required to obey it until it was modified, vacated or reversed, even if they had proper grounds to object to it. *See Maness v. Meyers,* 419 U.S. 449, 458 (1975); *Walker v. City of Birmingham,* 388 U.S. 307, 317-21 (1967); *United States v. United Mine Workers of America,* 330 U.S. 258, 293 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922).

In *Walker,* the Supreme Court explained that the central tenet of obedience to court orders necessitates what has come to be known as the collateral bar doctrine which prohibits challenges to the validity of a court order as a defense to criminal contempt. There the Court acknowledged that both the injunction that gave rise to the contempt convictions of civil rights marchers and the underlying parade ordinance raised "substantial" constitutional questions. *Walker,* 388 U.S. at 316-17. The Alabama courts had not permitted these constitutional challenges to be raised as a defense, but the Supreme Court nonetheless upheld the convictions, noting that the marchers, like the defendants here, had not appealed the injunction before disobeying it. The Court wrote:

> [I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for

> judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21 (footnote omitted); *see also United States v. Cutler,* 58 F.3d 825, 832 (2d Cir. 1995).

Here, because the Court's extended TRO, which became a preliminary injunction, still existed on the dates that defendants are alleged to have violated it, the defendants were required to comply with the order until it was modified or vacated through the judicial process. Defendants' alleged failure to comply with the order may be punished through criminal contempt. Under the collateral bar doctrine, defendants may not assert the possible invalidity of the order as a defense to a charge of criminal contempt. In fact, even if the order were later to be set aside on appeal, a finding of criminal contempt against the defendants would still stand. *See Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.,* 601 F.2d 48, 60 (2d Cir. 1979) (unlike civil contempt, a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal).

There are only two exceptions to the collateral bar doctrine: (1) where the order exceeded the court's jurisdiction; or (2) where the order was "transparently invalid." *Cutler,* 58 F.3d at 832. Even to invoke the "transparently invalid" exception, however, a defendant must make some good faith effort to seek emergency relief from the appellate court, or show compelling circumstances for failing to do so. *Id.* (citations omitted).

Neither the "jurisdiction" exception nor the "transparently invalid" exception to the collateral bar doctrine apply in this case. There is no question that this Court had

jurisdiction over the subject matter and personal jurisdiction over the defendants in this case. Thus, the TRO did not exceed the Court's jurisdiction.

Further, the Court's order extending the TRO beyond the time limitations in Rule 65(b) was not "transparently invalid." To the contrary, under the facts present here, the Court's order extending the TRO until the preliminary injunction motion was resolved was a valid exercise of the Court's authority. As explained above, at the time the Court issued the TRO, after an extensive TRO hearing, it was fully aware that it would not be able to complete the preliminary injunction hearing within the 20 days provided for in Rule 65(b). The Court has not found, nor have defendants cited, any case holding that a district court lacks the authority to extend the TRO beyond the time periods in Rule 65(b) under such circumstances or that such an extended TRO is automatically invalid. In fact, such a holding would be contrary to the Supreme Court's decision in *Sampson.* In *Sampson,* the district court extended the TRO past the 20-day time period in Rule 65(b) and the Supreme Court held that after 20 days, the extended TRO became a preliminary injunction. The Court then proceeded to review the merits of the preliminary injunction. Had the district court lacked authority to extend the TRO in the first instance, the Supreme Court would have never reached the merits of the preliminary injunction; it would have simply held that the extension of the TRO was invalid and vacated the order extending it. Tellingly, the entire *Sampson* decision concerns the validity of the extended TRO, but not once did the Court

suggest, or even hint, that the extension of the TRO beyond the Rule 65 time periods somehow invalidated it.[11]

Sampson, Pan Am. and *Levine* all recognize implicitly that there may be instances when a district court cannot render a considered ruling on a motion for a preliminary injunction within the time periods in Rule 65(b). In such instances, the district court may extend the TRO beyond the Rule 65 time periods while it is considering the preliminary injunction motion, provided that the TRO was initially issued after notice and a hearing.[12] In such a situation, the extended TRO ceases being an unappealable TRO and becomes instead an appealable preliminary injunction. In this way, the defendant subject to the injunction is offered protection. The defendant can take an immediate appeal of the extended TRO/preliminary injunction and have it vacated if it was improvidently granted. The defendant may not, however, simply ignore the extended TRO and disobey it.

The necessity of a district court being able to extend a TRO in order to complete its consideration of a preliminary injunction motion, as recognized in *Sampson, Pan Am.* and *Levine,* is perhaps best illustrated by a simple example. Take, for instance, a case where a plaintiff seeks a TRO and preliminary injunction that would enjoin a defendant from tearing down a building. The issues involved in the case are fact intensive and there are conflicting fact affidavits. On notice and after a hearing,

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[11] This same analysis applies also to the Second Circuit's decision in *Pan Am.*

[12] The fact that Rule 65(b) applies, on its face, only to TROs issued *ex parte* would also seem to support this proposition.

the district court grants the plaintiff's request for a TRO, finding that the plaintiff will suffer irreparable harm if the building is torn down. For various reasons, however, none of which are the fault of the plaintiff, the court cannot complete the preliminary injunction hearing and render findings of fact and conclusions of law within the 20-day time period in Rule 65(b). Under the theory put forth by defendants here, the district court in this example would be powerless to extend the TRO even one day to complete the preliminary injunction hearing because the 20-day time limit in Rule 65(b) is absolute; the district court must either issue a preliminary injunction within 20 days, presumably based solely on the conflicting fact affidavits, or allow the TRO to expire on the 21st day thereby freeing the defendant to tear down the building. Certainly this cannot be the law. Because the Second Circuit has repeatedly held that motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact, *see supra note 3,* the issuance of a preliminary injunction based solely on the conflicting fact affidavits is not a viable option for the district court. Yet the court cannot allow the TRO to expire because the same threat of irreparable harm to the plaintiff that existed at the time the TRO was issued still exists. In other words, the plaintiff would be forced to suffer irreparable harm, *i.e.,* the building being torn down, simply because the court was unable to resolve the preliminary injunction motion within 20 days. Such a result is unfair to the plaintiff and cannot be countenanced.[13] Thus, the district court must have the ability to extend the TRO until the preliminary

[13] Such a result could also provide defendants with an incentive to attempt to delay the preliminary injunction hearing beyond 20 days, thereby freeing them on the 21st day from the restraints of the TRO.

injunction motion is resolved. Defendant's protection lies in the fact that he can appeal the extended TRO as a preliminary injunction.

The situation in the example is exactly the situation here. Following notice and a hearing, the Court issued a TRO, upon finding that plaintiffs would suffer irreparable harm if injunctive relief were not granted. The issues regarding the preliminary injunction motion were fact intensive and the Court had before it conflicting fact affidavits. The Court realized that it would be unable to complete the preliminary injunction hearing and render a considered decision on the preliminary injunction motion within the 20-day time period in Rule 65(b). In fact, the preliminary injunction hearing itself ultimately lasted more than 20 days. Because the threat of irreparable harm to the plaintiffs still existed, the Court extended the TRO until the preliminary injunction motion was resolved. Under *Sampson, Pan Am.* and *Levine,* the extended TRO became a preliminary injunction and under the collateral bar doctrine, defendants were required to either appeal it or obey it.[14] Defendants, however, without attempting to

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[14] Defendants argue that because the burden of proof on a motion for injunctive relief is on the party seeking the injunction, they, as defendants, were not be [sic] required to seek appellate review of the extended TRO and were free to ignore it. This argument shows a lack of understanding of the collateral bar doctrine. Under the collateral bar doctrine, the only lawful means of contesting a court order is to seek judicial review of it. Otherwise, the order must be obeyed. As the Supreme Court has stated, "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.,* 445 U.S. 375, 386 (1980). Thus, the burden was on defendants to appeal the order if they no longer wanted to obey it.

seek any type of judicial relief, proceeded to violate (or allegedly violate) the Court's order. Such conduct is not countenanced by any reading of the applicable case law and is subject to punishment for criminal contempt.

Defendants argue that even if the extended TRO were considered to be a preliminary injunction after the 20-day period expired, it would still have been "transparently invalid" because it was not supported by findings of fact and conclusions of law as required by Rule 52(b) of the Federal Rules of Civil Procedure. This argument is without merit.

In *Sampson,* the TRO that the Supreme Court ultimately reviewed on the merits did not contain findings of fact and conclusions of law pursuant to Rule 52(a). Nevertheless, the Supreme Court held that it was not foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supported the issuance of the injunctive relief. *See Sampson,* 415 U.S. at 86-87 n. 58. Had the Supreme Court determined that the lack of findings of fact and conclusions of law automatically made a preliminary injunction invalid, the Court would not have reached the merits of the injunction. Instead, it would have simply labeled the extended TRO a preliminary injunction and declared it invalid for lack of findings of fact and conclusions of law. Indeed, that was exactly the course of action recommended by Justice Marshall in his dissent, *id.* at 98, but a majority of the court rejected such a result. *Id.* at 86-87 n. 58.[15]

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[15] In *Granny Goose,* which was decided less than a month after *Sampson,* Justice Marshall, writing for the Court this time, stated in

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Consistent with *Sampson,* the Second Circuit, when faced with preliminary injunctions not having sufficient findings of fact and conclusions of law under Rule 52(a), has consistently left the injunction in place and remanded the case back to the district court for proper findings of fact and conclusions of law, finding that it would be "inequitable to punish [the movant] for the district court's failure to make specific findings." *See, e.g., Rosen v. Siegel,* 106 F.3d 28, 33 (2d Cir. 1997); *Inverness Corp. v. Whitehall Labs.,* 819 F.2d 48, 51 (2d Cir. 1987).[16] Thus, defendants' argument that the extended TRO was "transparently invalid" and that they did not have to obey it because it did not contain sufficient findings of fact and conclusions

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dicta that "[w]here a temporary restraining order has been continued beyond the time limits permitted under Rule 65(b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid." *Granny Goose,* 415 U.S. at 443 n. 17 (citations omitted). This Court notes the obvious tension between this language and the holding in *Sampson.* This language appears to be basically the same language that Justice Marshall used in his dissent in *Sampson,* but it was rejected by the majority of the Court in that case. Justice Marshall makes no attempt in *Granny Goose* to distinguish *Sampson*; in fact he does not even mention *Sampson.* In any event, since this language in *Granny Goose* was only *dicta* (the TRO in *Granny Goose* was not, in fact, extended and therefore expired under Rule 65(b)), the Court shall follow the Supreme Court's holding in *Sampson.*

[16] Defendants reliance on the *dicta* in *Tekkno Labs., Inc. v. Perales,* 933 F.2d 1093, 1097 (2d Cir. 1991) – predicting that if the district court had not supplemented a preliminary injunction with subsequent fact finding, the circuit court "would have been compelled" to vacate the injunction and any order of contempt based on the injunction – is misplaced for three reasons: (1) the language relied upon is, in fact, *dicta* and appears to be inconsistent with other Second Circuit precedent; (2) *Tekkno* dealt with a finding of civil, not criminal contempt; and (3) the district court in *Tekkno* lacked subject matter jurisdiction to enter the preliminary injunction. *Id.* at 1099.

of law cannot withstand scrutiny under *Sampson* and Second Circuit precedent.

In any event, even if it is assumed *arguendo* that the Court's extended TRO was somehow "transparently invalid," defendants cannot avoid the collateral bar doctrine because they made no effort to seek emergency relief from the appellate court and have pointed to no compelling circumstances justifying their decision to ignore the order. *See Cutler,* 58 F.3d at 833 (citations omitted). Thus, the "transparently invalid" exception is unavailable to them.

III. 18 U.S.C. § 401(3)

Defendants also argue that they cannot be held in contempt under 18 U.S.C. § 401(3) because the extended TRO was not "lawful" within the meaning of the statute. Section 401(3) provides:

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Court finds defendants' argument without merit for two reasons. First, as discussed above, the Court finds that its extension of the TRO beyond the 20-day limitations period was a lawful and valid exercise of the Court's authority. Second, "lawful," as used in § 401(3), does not have the meaning that defendants attribute to it. Defendants appear to be arguing that in order for a court order to be "lawful" for purposes of § 401(3), it must be correct in all respects. This argument, however, is directly contrary to the collateral bar doctrine. Under the collateral bar

doctrine, a defendant may be held in criminal contempt under § 401(3) even for an order that is later determined to be invalid or incorrect. Thus, the word "lawful" in § 401(3) cannot mean that the order must be free from all error. It simply means that the order must be free from such plain jurisdictional defects as to render it manifestly inoperable. Because the Court unquestionably had jurisdiction in the *Spitzer* case, the extended TRO was "lawful" within the meaning of § 401(3).

IV. Objection to Appearance of Amici and Motion to Dismiss

At oral argument on the objections to the Magistrate Judge's Report and Recommendation, the defendants renewed their objection to the appearance of the *amici* in this criminal contempt proceeding. Defendants argue that the case should now be dismissed because the appearance of the *amici* has irrevocably tainted the proceedings. In the alternative, defendants ask that the *amici* be dismissed from the case and that the Court not consider their briefs or arguments. Defendants also move to have the United States Attorney's Office disqualified because it has discussed the case with the *amici*. The Court finds defendants' arguments frivolous.

Defendants have failed to cite any authority that would require the dismissal of the action based on the appearance of the *amici* or that would prohibit the appearance of *amici* in this case. The *amici* have an interest in this case as they are the parties who brought the contempt allegations in the first instance in the underlying civil action. Accordingly, the Court denies defendants' motion regarding the *amici* in its entirety.

V. Motion for Recusal

Defendants contend that the Court should recuse itself from this case, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 455, because: (1) the Court heard evidence relating to the alleged contempt violations during the preliminary injunction hearing in the underlying civil action and during these contempt proceedings; and (2) the Court is being called upon to rule on the validity of its own order, which forms the basis of the contempt charges in this case. The Court finds that recusal is not required or warranted in this case.

Although Rule 42(b) disqualifies a judge from presiding over a contempt hearing where "the contempt charged involves disrespect to or criticism of [that] judge," disobedience of a court order does not fall within that category. *See Nilva v. United States,* 352 U.S. 385, 395-96 (1957); *In re Puerto Rico Newspaper Guild Local 225,* 476 F.2d 856, 859 (1st Cir. 1973) (rejecting contemnor's argument that district court should have disqualified itself from contempt proceeding simply because it issued the TRO that was alleged to have been violated).

Under 28 U.S.C. § 455(a), a judge is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned."[17] "[T]he test to be applied is an objective one which assumes that a reasonable person

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[17] Section 455(b) applies when a judge, in fact, has a personal bias or prejudice concerning the parties or the case or personal knowledge about the case. Defendants do not suggest that this section applies to the instant situation.

knows and understands all the relevant facts." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). Generally, grounds for recusal may not be predicated on a judge's prior judicial rulings or involvement in the case, but must arise instead from some extrajudicial source. *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

Here, defendants argue that because they are attacking the validity of the Court's TRO in their motion to dismiss, an objective observer might reasonably question the Court's impartiality. However, defendants have not cited, nor has the Court found, any authority that would require the Court's recusal under these circumstances. District courts are often called upon to review challenges to the validity of their own decisions. For example, on motions for a new trial, motions for judgment of acquittal, and motions for reconsideration, a district court must often review challenges to the correctness of its own orders and actions. Under defendants' argument, recusal would be required in each of those instances. In fact, under defendants' theory, a defendant charged with contempt for violating a court order could always cause the disqualification of the judge who issued the order by simply challenging the order's validity. Such a result is simply not required under § 455(a).

Nor is the Court's recusal mandated by the fact that it previously heard evidence relating to the alleged contempt violations during the preliminary injunction hearing and during the instant contempt proceedings. Any opinions based on facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute grounds for recusal under § 455(a), "unless they display a deep-seated favoritism or antagonism that would

make fair judgment impossible." *Liteky,* 510 U.S. at 550-51, 555. No such showing has been made here.

VI. Other Pending Motions

Defendants have two other pretrial motions pending: (1) a motion to dismiss on the ground that their actions on the dates in question were protected by the First Amendment; and (2) a motion for change of venue to Rochester, New York. Both of these issues were previously raised and addressed in the underlying civil action. Accordingly, due to the Court's familiarity with these issues, it will go ahead and resolve these motions on the papers rather than referring them back to the Magistrate Judge.

A. Motion to Dismiss on First Amendment Grounds

Defendants argue that the contempt charges against them should be dismissed because their alleged violations of the Court's TRO, even if true, were protected First Amendment actions constituting a legal defense to the contempt charges. Defendants raised similar arguments in opposition to the motion for preliminary injunction in the underlying civil action.[18] The Court addressed these arguments in its preliminary injunction decision filed July

[18] In *Spitzer,* defendants argued that the requested preliminary injunction would violate their free speech rights. Here, they argue, in their papers, that their actions were "protected exercises of free speech and *religion.*" *See* Defendants' Notice of Joint Motion at 14 (emphasis added). Because defendants fail to offer any argument regarding freedom of religion, the Court considers only those arguments relating to freedom of speech.

26, 2000, in the underlying civil action. *See Spitzer,* Item No. 178. The Court hereby incorporates by reference that decision and relies on the reasoning therein to find that the TRO did not violate defendants' rights under the First Amendment.[19]

In their motion, defendants note that the Court's TRO provided that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution." *Spitzer,* Item No. 38 at 16. Defendants argue that because they were doing nothing more than exercising their First Amendment right to protest, their actions did not violate the TRO. The Court finds this argument without merit. The TRO clearly and unequivocally prohibited defendants from being present within certain buffer zones located outside reproductive health care clinics located within the District. Thus, even if defendants' activities would normally have been protected by the First Amendment had they taken place outside those buffer zones, the TRO prohibited defendants from engaging in those same activities within the buffer zones.

[19] Further, even if defendants believed that their actions were protected by the First Amendment, they were still required under the collateral bar doctrine to obey the TRO/preliminary injunction. *See Walker,* 388 U.S. at 316-17 (holding that even where injunction that gave rise to the contempt convictions and the underlying parade ordinance raised "substantial" constitutional questions, civil rights marchers were still required to abide by the injunction).

B. Motion for Change of Venue

Defendants have moved for a change of venue from this part of the Western District of New York located in Buffalo, to the part of the Western District located in Rochester. In other words, defendants ask for an "intradistrict" change of venue.

Although not expressly stated by defendants in their papers, it would appear that they are moving for change of venue pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, which provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

The Advisory Committee Notes state that standard to be applied for change of venue in criminal cases is similar to that applied under 28 U.S.C. § 1404(a) in civil cases.

At the outset, the Court notes that Rule 21(b) only provides for transfer of a criminal case from one district to another district, not from one court within a district to another court within the same district. Thus, it is not clear that the relief that defendants seek is even available under the applicable Rule.

Even if such relief were available, the Court finds that a change of venue is not warranted under the facts and circumstances present here. Defendants ask for a change of venue "[for] their own convenience, and in the interest of justice (*i.e.*, obtaining a neutral and detached Article III federal judge)." Defendants' Notice of Joint Motion, at 15. Defendants made a similar motion in the underlying civil

action and the Court denied that motion in a decision filed June 16, 1999. *See Spitzer,* 69 F. Supp. 2d at 416-19. The Court hereby incorporates by reference that decision, and based on the reasoning therein, denies the motion for change of venue. In fact, the Court's increased familiarity with *Spitzer* and this case, gained since the time of its previous decision, now makes an even stronger case for retaining venue in this Court.

The Court further notes that defendants' desire to obtain a different judge does not present a valid legal reason for change of venue. Neither Rule 21(b) nor § 1404(a) was intended to allow judge shopping by litigants. *See Betts v. Atwood Equity Coop. Exch., Inc.,* 1990 WL 92495, at *1 (D. Kan. Jun. 13, 1990).

CONCLUSION

For the reasons stated, the Court: (1) denies defendants' motions to dismiss the contempt charges; (2) denies defendants' motions to disqualify the *amici* and the United States Attorney; (3) denies defendants' motion for recusal; and (4) denies defendants' motion for change of venue. Further, after careful consideration of the facts and circumstances present here, the Court hereby limits the maximum possible punishment in this case to a term of imprisonment of six months or a fine of $5000. A bench trial shall commence on May 1, 2001 at 9:30 a.m. A final pretrial conference shall be held on April 30, 2001 at 11:00 a.m.

IT IS SO ORDERED.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: February 27, 2001

Joint Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re criminal contempt proceeding against Gerald Crawford and Michael Warren	00-Misc Cr-29-A

STIPULATION

The Government and the defendants stipulate that if Mary Elizabeth Aramini, Esq., were called as a witness in the trial of this case, she would testify as set forth in the attached transcript, with the following exceptions:

1) on page 5, line 12, the first word should be "intention" and not "extension"; and

2) on page 13, line 1, the last word should be "contempt" and not "defense."

KATHLEEN M. MEHLTRETTER
United States Attorney

/s/ Paul J. Campana
BY: PAUL J. CAMPANA
Assistant U.S. Attorney

GERALD CRAWFORD	MICHAEL WARREN
/s/ Kimberly A. Schechter	/s/ BJB
KIMBERLEY A. SCHECHTER, ESQ.	BRYAN J. BROWN, ESQ.
Counsel for Gerald Crawford	Counsel for Michael Warren

Dated: June ___, 2001

[1] **MARY ELIZABETH ARAMINI**

Grand Jury May 1999

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- vs -

MICHAEL WARREN **1999-R-00758**

GERALD CRAWFORD

Proceedings held before the United States Grand Jury, in the Federal Centre, 138 Delaware Avenue, Buffalo, New York, on Thursday, October 28th 1999, commencing at 3:35 p.m.

APPEARANCES: **DENISE E. O'DONNELL,**
United States Attorney
BY: PAUL J. CAMPANA,
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202

PRESENT: Mary Ann Youknut
Grand Jury Court Reporter.

[2] FOREMAN: Please raise your right hand. Do you swear or affirm that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth so help you God?

WITNESS: I do.

EXAMINATION BY MR. CAMPANA:

Q. Can you state your name for the record, please?

A. Mary Elizabeth Aramini.

Q. Ms. Aramini, are you an attorney?

A. Yes, I am.

Q. How long have you been an attorney?

A. It will be 14 years in February.

Q. Is the majority of your practice focused on state court proceedings?

A. Almost exclusively.

Q. Did there come a time in 1999 that you became involved in a case, People of the State of New York, etcetera, etcetera versus Operation Rescue and others including Gerald Crawford and Michael Warren?

A. Yes, I did.

Q. Was that case filed in the United States District Court for the Western District of New York here in Buffalo?

[3] A. Yes, it was.

Q. Is the case being presided over by Judge Richard Arcara?

A. Yes, sir.

Q. Can you tell the grand jury what your status is in that civil case?

A. I represent the Rochester defendants that remain in the case following a settlement and that includes Gerald Crawford, Michael Warren, Mary Beth Powley an organization called Rescue Rochester.

Q. Okay. Did there come a time in that case specifically on or about April 15th of this year, 1999 that Judge Arcara issued a Temporary Restraining Order?

A. Yes, he did.

Q. For ease of reference can we henceforth refer to that as the TRO?

A. Yes.

Q. In connection with your representation of Gerald Crawford and Michael Warren, have you become aware that the New York State Attorney General Office has referred a matter to Judge Arcara to determine whether or not two of your clients have committed criminal contempt as against this TRO?

[4] A. Yes, I am aware of that.

Q. In connection with that, have you received permission from Gerald Crawford and Michael Warren to testify before this grand jury about communications that you have had with them and they have had with you on the subject matter of Judge Arcara's TRO?

A. Yes, I did obtain that permission.

Q. Did you obtain that permission in writing?

A. Yes, I did.

Q. Have you brought the original of these releases from your clients into the grand jury today?

A. Yes, I did.

Q. Okay. I want to direct your attention as a point of reference to May 1st of this year, 1999. Did you have a meeting with your clients that day?

A. Yes, I did.

Q. Both clients?

A. Yes.

Q. Where?

A. It was held in the conference room of my former office. The office was mine at the time, it no longer is.

Q. Was there a pre-arranged meeting between yourself and these persons?

[5] A. Yes, there was.

Q. Prior to that, specifically April 29th of 1999 did you attend a session in the US District Court in Buffalo in this civil case?

A. Yes, I was there.

Q. Do you recall whether or not either Mr. Crawford or Mr. Warren were there?

A. I don't specifically remember.

Q. Have you gone over with me prior to your testimony a docket entry on the court docket concerning the court giving these individuals its extension to extend the temporary restraining order for another ten days to continue thereafter until after the preliminary injection hearing is completed?

A. Yes, we did discuss that.

Q. Okay. Do you have any specific recollection of what happened on the 29th?

A. Yes, I remember being in court that day.

Q. Do you remember the court announcing the extension that is referred to on this docket sheet entry?

A. Yes, I remember him saying that.

Q. Now, on May 1st which was two days after April 29th at the meeting with your clients, did your [6] clients and you discuss the validity of the Temporary Restraining Order?

A. Yes, we did.

Q. Tell the grand jury what your understanding was then from April 15th on concerning the time period during which a Temporary Restraining Order is valid?

A. I had looked at and had told my client that I had reviewed Rule 65-B regarding Temporary Restraining Orders and that under the statute they could only last for ten days. That under certain circumstances it's possible for them to be extended for an additional ten days making the length of a TRO 20 days and that's what I told my clients.

Q. Did you tell them that on May 1st?

A. Yes, I did.

Q. Did your clients discuss with you the impact the Temporary Restraining Order would have or might have on them demonstrating or appearing on the premises of abortion clinics covered by the TRO?

A. Yes, we did discuss that.

Q. Can you tell the grand jury the sum and substance of that discussion as it relates to the continued validity or invalidity of the TRO?

[7] A. I took the Temporary Restraining Order provisions and I hand drew a map of abortion clinic locations in Rochester and showed them where they would be restricted from entering for, I had told them ten days but a maximum of 20 days.

Q. Would one of these abortion providing centers be the Planned Parenthood building?

A. Yes.

Q. Go ahead.

A. And I told them that they would be restrained from entering this zone, buffer zone for the 20 days of the TRO.

Q. Were these buffer zones marked out by lines on the sidewalks measured from driveway areas and other points at the Planned Parenthood Building?

A. I didn't know it then but yes, they were marked with paint on the sidewalk at least in, not at all the locations in Rochester but at least at the Planned Parenthood they were marked on the sidewalk.

Q. During the course of your representation of Mr. Crawford and Mr. Warren up to this point, May 1st, had you discussed with them the restrictions put on them by the TRO as it related to demonstrations?

[8] A. Yes, I did discuss that.

Q. And did you come to a conclusion that to your satisfaction they understood what those restrictions were other than it related to the time period?

A. Yes, they did.

Q. Okay. And was it your understanding at that point, May 1st up and until now, that they have received a copy of the TRO and became familiar with its provisions?

A. It was my understanding that they received a copy of the TRO directly from the court.

Q. Okay. And you had discussed the provisions with them?

A. Yes, I did.

Q. Were you satisfied that they understood them as they related to where they could be and where they could not be?

A. It appeared to be that they understood.

Q. Now, getting back to what you told them on May 1st, focusing on that, did you talk about criminal contempt on that day?

A. Yes, I did.

Q. Tell the grand jury what you talked about in sum and substance?

[9] A. Basically I told them that if they violated the TRO during at least the first ten days of its existence and probably the first, the 20 days that a TRO could last, they would probably be charged with criminal contempt.

Q. If what?

A. If they went into the buffer zone or any other way violated the Temporary Restraining Order provisions.

Q. Within what time period?

A. The 20 days.

Q. Did you give them a date as to when you believe the 20 days expired?

A. Yes, the 20th day was May 4th.

Q. So what did you tell them concerning the period from April 15th, 1999 to and including May 4th, 1999?

A. I told them that if they did violate any of the provisions of the TRO during the first ten days, from April 15th ten days forward, I believed they would definitely be charged with criminal contempt.

Q. Let me interrupt. Did you tell them whether or not there would be any defense to a criminal contempt charge if they violated the TRO within [10] the ten day period?

A. I didn't talk about a defense to that during the ten days, the initial ten days. I did discuss the defense to a criminal contempt charge after ten days and I told them I felt there would be a solid defense after the 20 days. I felt that the period between the ten days and the 20 days was sort of in a legal limbo.

Q. A legal, limbo?

A. Well, I had –

Q. I'm emphasizing for the reporter. You said a legal limbo?

A. Legal limbo.

Q. Did you impart to them that within ten days through day 20 there is some ambiguity as to whether or not they could validly be charged with criminal contempt?

A. Yes.

Q. Did you tell them where that ambiguity arose from?

A. I told them it came from the statute, that 65-B made a provision for an extension of ten days but that in our case that didn't happen the way that statute is outlined and so I was not certain whether this was a valid extension of the TRO [11] from ten days to 20 days.

Q. What if anything did you tell them during your meeting on May 1st as to what might happen with respect to criminal contempt charges if they were to demonstrate within the buffer zone on or after May 4th?

A. What I told them was that if I was in the position of the plaintiff's attorney that I would not want to bring a criminal contempt action against them because I felt that the attorneys who are representing the plaintiff being even more experienced than I were would request that TRO had expired by law on the 20th day and that they would not have a good case if they tried to charge them with criminal contempt after May 4th.

Q. Did you them tell them why in your opinion there would not be a good criminal contempt case after May 4th?

A. I told them that I felt they had a solid defense that the TRO didn't exist after May 4th.

Q. Did they respond to your advice on that point? What did they say if anything?

A. They did ask me questions about, you know, how likely I though it would be that they might be charged, whether or not I felt that the plaintiff [12] attorney would try to do it even though legally they had a solid defense.

Q. Did you respond to them on that point?

A. I think we sort of speculated both ways. I felt that there are different attorneys representing different plaintiffs and I felt that certain attorneys would probably want to try for criminal contempt even though there was a valid defense just because it would keep them in court longer or have other motives, any way and that at least one of the other attorneys probably would not want to because they knew they didn't have, they didn't have a good case and they had a valid defense.

Q. Now, I want to ask you this. Comparing what you told them on May 1st, did you have in mind or any idea that what you said to them on May 1st was consistent or inconsistent with what you heard in court on April 29th about extending of the TRO?

A. I told them that, I told them what the Judge said but I also told them that had not made a lot of sense to me.

Q. Okay. And following up on what you told them on May 1st of 1999, are you sure that you discussed with them the idea of a concept of criminal [13] contempt and a defense to criminal defense?

A. I'm absolutely sure that I did that. I did it on more than one occasion and I know for certain I did it on May 1st.

Q. Did you do it on occasions following May 1st?

A. Yes, I did.

Q. Can you tell by reference to any notes that you made when you might have done it or approximately when you might have done it?

A. I don't have a specific recollection of the date but I know that I did discuss it on more than one occasion with them and I believe I did discuss it with Mr. Crawford on Saturday, May 15th and I discussed it, I believe, with both Mr. Crawford and Reverend Warren on Friday, May 21st. I believe I also discussed it with them following these dates because we had a number of conversations regarding the Temporary Restraining Order and the Judge's position about it throughout the summer as we headed toward the preliminary injunction hearing.

Q. Is there anything else that you said to your clients, Gerald Crawford and Michael Warren that relates to any opinions or interpretation of the law that you imparted to them as it relates to [14] their demonstration around the Planned Parenthood Building in Rochester that is on University Avenue or the Genesee Hospital?

A. I also discussed with them some case law that I was familiar with, one case was *US versus Weslin*, 2nd circuit decision where the Judge had said that protestors could hold signs, pray or have conversations anywhere at anytime near an abortion facility. I also discussed a new case, Sun Diamond Grocer which was a 1999 case that reflected on intent and I also –

Q. What did you discuss about these cases?

A. Specifically that I felt there was an issue that we would win an appeal when we get to the point where we could appeal the Judge's order and the Sun Diamond case was relevant because there is a provision in the Temporary Restraining Order, I'm not positive without seeing it, but I think it's on page 16 at the bottom where Judge Arcara had put in the Order that this TRO did not restrict legitimate first amendment activities and the second circuit case in the Weslin decision stated that pro-life demonstrators could be anywhere anytime with signs and praying or conversing.

Q. Did you discuss with them that these cases may [15] have been dealing with Temporary Restraining Orders different from the one that Judge Arcara issued on April 15, 1999? Did you make that distinction clear to them?

A. No, I did not.

Q. Did they ask any questions about how this case might have differed from the cases that you were discussing?

A. No, they didn't ask and I didn't say.

Q. Is there anything else that you would like to add of a pertinent factual nature as to what you said to Mr. Crawford and Mr. Warren or what they said to you concerning the validity of the Temporary Restraining Order issued in this case, the one in which you represented them in terms of its continued validity or non-validity after the 20 day period that you discussed?

A. They both asked me about, they asked me to confirm that holding a sign was a legitimate activity and I said yes, I though that was a classic example; if that was

not First Amendment activity I could not say what was. We talked about the provisions in the Judge's Order about his not intending to restrict the legitimate First Amendment activity and they did ask [16] questions, what was a legitimate 1st Amendment activity. Was holding a sign, was praying something along these lines and I said yes, these were legitimate 1st Amendment activities.

Q. Did you ever tell them anything concerning the ability of the Rochester Police to enforce the injunction?

A. I told them that the federal marshals would have to be called and the injunction read before any other steps could be taken.

Q. Did you give them any advice as to what they should do if federal marshals began reading the injunction in their presence?

A. I don't remember if I commented about that.

Q. Did that issue arise in your discussions with them?

A. At some point later, not in May, Mr. Crawford did say to me; "but the Temporary Restraining Order expired, didn't it because it was temporary" and I said; "yes, it should have expired at the latest after 20 days".

Q. Do you continue to be the attorney for Mr. Crawford and Mr. Warren in the civil case as we speak now?

A. Yes.

[17] Q. Now, did you prior to May 22nd of this year, did you tell Mr. Crawford and Mr. Warren whether or not in your opinion their demonstration in front of the Genesee Hospital or the Planned Parenthood Clinic might have

any adverse impact on them throughout the course of the civil litigation?

A. Yes, I had told them that even though the TRO expired at the l[illegible]est on the 20th day that I was concerned that their conti[illegible]ed protest might be used negatively by Judge Arcara that would impact the man's decision on the case because we were going to be in the front of him for quite a long time and specifically I was concerned how he might treat the request that we made a motion objecting, things of that nature.

Q. Did you make, did you or did you not make a distinction between the kind of adverse impact and a charge of criminal contempt?

A. Yes, I told –

Q. Explain how you described that distinction to your clients?

A. I told them that they had a solid defense to criminal contempt but even though they had a solid defense to criminal contempt it didn't mean, it might not be a charge and have to go [18] through the difficult proceedings and prove that defense. I also told them that aside from being charged with criminal contempt that as I said, Judge Arcara would use it negatively and it would impact on other aspects of the civil case, it had nothing to do with contempt such as ruling on objections or, you know, other kinds of things. We would be making motions during the course of the civil case asking for, possibly for courtesies, could we do something on a certain date and not another date when it might be inconvenient and I felt that we would not be treated as well possibly because of these activities.

Q. Did they in sum and substance seek advice from you as to whether or not demonstrating within the buffer zone would be a contemptuous violation of the TRO if it were, if this conduct were engaged in after that May 4th day when the 20 day period expired?

A. They did ask about it, not in these words but, yes.

Q. What was your advice to them?

A. I told them that they had a valid defense to any allegation of contempt but they had to realize [19] that just because you had a valid defense to something does not mean that you would not have to go through a proceeding, that there were other agenda's that were present in this case. I specifically talked about some of the behavior of other attorneys, the plaintiff's attorney and how they handled the whole civil case.

Q. Okay.

A. That's what I told them.

Q. You explained to them possibly other adverse impacts and is it fair to say that the fair summary of your advice was they may have to go through some difficulty to prove the defense that you were describing to them?

A. Yes, I told them that and I told them that part of the reason, part of the motivation night [sic] have been anything to try to inconvenience their schedule or their attorney, you know, make us do more work. I think it's common knowledge we work without a fee and that it would make it harder and harder for an attorney to donate their time to these kinds of issues and causes if they were put to more and more work.

Q. Did you advise them, did you give them any affirmative defense advice that they should go [20] demonstrate or did you give them affirmative advice not to demonstrate in the buffer zone?

A. I never gave them affirmative advice, I only gave suggestions.

Q. What was the nature of the suggestions that you made to them?

A. I had suggested that they wait.

Q. And did they reject that suggestion?

A. At the time they did not. They did not reject it, they just looked like they were contemplating my suggestion.

Q. Did you come later to learn they rejected that aspect of your suggestion?

A. I was given information in August that seemed to imply they had not followed, had not agreed with my suggestion.

Q. Did there come a time when you learned that the attorney general had, attorney general's office had moved in front of Judge Arcara to refer matters or address the question as to whether or not a criminal contempt of his TRO was committed?

A. Yes, that had happened in August.

MR. CAMPANA: Thank you very much.

(witness excused)

[21] CERTIFICATION

THIS IS TO CERTIFY, that I, Mary Ann Youknut having attended a session of the Federal Grand Jury, as Grand Jury Stenographer, on Thursday, October 28th, 1999 reported the proceedings contained in the foregoing 20 at the time and place set forth in the heading in the foregoing matter. That the transcript is a true and accurate transcription of my stenographic notes, to the best of my ability.

/s/ Mary Ann Youknut
Mary Ann Youknut
Grand Jury Court Reporter.

Dated: November 2nd, 1999

Gov't Exhibit 2 – Certified Copy of the Temporary Restraining Order issued April 15, 1999 in Civil Action 99CV-209-A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY ELIOT SPITZER ATTORNEY GENERAL OF THE STATE OF NEW YORK; BUFFALO GYN WOMENSERVICES, INC., DR. SHALOM PRESS, M.D.; PLANNED PARENTHOOD OF THE ROCHESTER/SYRACUSE REGION; DR. MORRIS WORTMAN, M.D.; PRO-CHOICE NETWORK OF WESTERN NEW YORK,

Plaintiffs,

v.

OPERATION RESCUE NATIONAL; LAST CALL MINISTRIES; RESCUE ROCHESTER; LAMBS OF CHRIST; CHRISTIAN AMERICAN FAMILY LIFE ASSOCIATION, INC. (CAFLA); BOB BEHN; BONNIE BEHN; PHILIP "FLIP" BENHAM; MARY MELFI; NORMAN WESLIN; GERALD CRAWFORD; MICHAEL WARREN; RICHARD ARMENIA; MARY ARNO; PAUL ARNO; JOHN BARRON; ALBERT BOETTCHER; EVA BOLDT; MARTIN CHAMBERLAIN; KEN DELOZIER; AMY DORSCHEID; ROBERT DORSCHEID; DANIEL DRURY; DARREN DRZYMALA;

TEMPORARY RESTRAINING ORDER
99-CV-209-A
Filed Apr. 15, 1999
ATTEST: A TRUE COPY U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK
By [Illegible]
Deputy Clerk

ALAN FRICKE; AMY FRICKE; JAMES GOVOLA; MARY SUE GOVOLA; KENNETH HARMS; MICHAEL ILUZZI; KAREN JACKSON; ERIC JOHNS; BERNIE KLEINHAMMER; PAUL KOEHN; RICHARD KRULEWICZ; DANIEL LAMANTAIN-LEATHERMAN; ROSINA LOTEMPTO; EDMUND LUTZ; DENNIS MARRIOTT; DAVID MARTIN; ARNOLD MATHESON; MICHAEL MCBRIDE; WILLIAM MICHAEL; JAMES MISSALL; MICHAEL MOMBREA; DWIGHT MONAGAN; JACOB MUELLER; SHARON MURPHY; LINDA PALM; HETTIE PASCOE; ROBERT POKALSKI; MARY BETH POWLEY; DAN PRZYWUSKI; ROBERT RACO; JACQUELINE RADEMACHER; RENE RIDDLE; W. RANDOLPH SMITH; WILLIAM SMITH; SHERRIE STERLACE; ROSEANNE SUTTER; GERALD SUTTER; JOHN URGO; JOHN VANDEVEN; MICKEY VANDEVEN; NANCY WALKER; PHYLLIS WALKER; CALVIN ZASTROW; JOHN AND JANE DOES, the last two named being fictitious names, the real names of such persons being currently unknown but who are active in defendant organizations or act in concert with the above named individuals to engage in, or who will engage in, the conduct complained of herein,

Defendants.

Upon consideration of the complaint, plaintiffs' motion for a temporary restraining order, the affidavit of Lucinda M. Finley, sworn to March 22, 1999, the affidavits submitted in support of plaintiffs' motion for a preliminary injunction, and the evidence introduced at a hearing held on plaintiffs' motion for a temporary restraining order, the Court finds, for purposes of plaintiffs' motion for a temporary restraining order, that plaintiffs have shown by a preponderance of the evidence that they will suffer irreparable harm if injunctive relief is not immediately granted and a likelihood of success on the merits, and that they are entitled to injunctive relief under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and it is therefore hereby

ORDERED that defendants; the officers, directors, agents, and representatives of defendants; and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them; and likewise any persons present protesting against defendants' activities and receiving actual or constructive notice of this Order are:

1. Temporarily restrained from:

   (A) trespassing on; standing, sitting, lying or being present in or on; blocking, impeding or obstructing ingress to or egress from any facility providing reproductive health care services in the Western District of New York ("facility"), including any hospital, clinic, physician's office, or other facility that provides medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy;

(B) trespassing on; standing, sitting, lying or being present in or on; blocking, impeding or obstructing ingress to or egress from any parking lot, driveway, driveway entrance, or walkway entrance of any such facility, and the parking lots used by the patients and staff of any such facility;

(C) trespassing on; standing, sitting, lying or being present in or on; blocking, impeding or obstructing ingress to or egress from the common stairwells or lobby areas which provide access to any such facility;

(D) physically abusing, grabbing, touching, pushing, shoving, crowding or tortuously harassing persons entering or leaving, working or using the services at any such facility;

(E) using any mechanical loudspeaker or sound amplification device, including but not limited to megaphones, bullhorns, and electric amplifiers, or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of any such facility;

(F) defacing, vandalizing, or damaging in any way the property of any such facility;

2. And further temporarily restrained, at the reproductive heath care facility of Buffalo GYN Womenservices, 2500 Main Street, Buffalo, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the sidewalk or curb on the west side of Main Street inside a buffer zone measured from 60 feet from the southern edge of the driveway

entrance to the facility and 58 feet from the northern edge of the building of the facility;

(B) on the public sidewalk on the west side of Main Street proceeding in a southerly direction from the southern edge of the buffer zone described in paragraph 2(A) to the intersection with Greenfield Street, demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the public sidewalk other than the outer four foot width of sidewalk alongside the curb;

(C) on the public sidewalk on the west side of Main Street proceeding in a northerly direction from the northern edge of the buffer zone to the corner of Fairfield Street demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the driveway entrances to the gas station that lies in between Womenservices and Fairfield Street, and in or on the public sidewalk that lies in between the driveway entrances to the gas station, demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on any portion of the public sidewalk except for the outer four foot width of sidewalk alongside the curb;

(D) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Main Street in the blocks in between Greenfield Street to the south, and Fairfield Street to the north, and crossing Main Street at any place other than designated pedestrian crossings;

3. And further temporarily restrained, at the reproductive health care facility of Planned Parenthood of the Rochester/Syracuse Region, Inc., located at 114 University Avenue in Rochester, New York, from:

   (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the public sidewalk within a buffer zone measured from 50 feet from the northwestern edge of the driveway entrance going towards North Street, and measured from 25 feet from the edge of the building going southeast towards Scio Street;

   (B) on the public sidewalk running from the southeastern edge of the buffer zone to the corner of Scio Street, demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present in or on any portion of the sidewalk except for the outer four foot portion alongside the curb;

   (C) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of University Avenue in the block between Scio and North Streets, and crossing University Avenue at any place other than designated pedestrian crossings;

4. And further temporarily restrained, at the reproductive health care facility of Dr. Shalom Press, located at 2550 Sweet Home Road in Amherst, New York, from:

   (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on the public right of way along the east side of Sweet Home Road;

(B) on the west side of Sweet Home Road, demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of the driveway entrance to the medical facility at 2550 Sweet Home Road;

(C) on the west side of Sweet Home Road, outside the buffer zone described in paragraph 4(B), demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs within three feet of the shoulder of Sweet Home Road;

(D) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Sweet Home Road, and crossing Sweet Home Road at any place other than designated pedestrian crossings;

5. And further temporarily restrained, at the reproductive health care facility of Planned Parenthood of Buffalo and Erie County located at 2697 Main Street in Buffalo, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of the driveway entrance to the facility parking lot on Main Street;

(B) on other portions of the public sidewalk on Main Street and Amherst Street alongside any part of the building of the facility, demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within the inner ten foot portion of the sidewalk measured from the edge of the building towards the curb;

(C) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Main Street in the block between Amherst Street and Morris Street, or in or on any portion of Amherst Street in the block between Main Street and Pannell Street, or crossing Main and Amherst Streets at any place other than designated pedestrian crossings;

6. And further temporarily restrained, at the reproductive health care facility of Planned Parenthood of Buffalo and Erie County located in Wimbledon Plaza on Center Road in the Town of West Seneca, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of any driveway entrance to the Wimbledon Plaza parking lot on the south side of Center Road;

(B) on the south side of Center Road, outside the buffer zone described in paragraph 6(A), demonstrating, congregating, standing, sitting, lying down or posting or carrying signs within three feet of the shoulder of Center Road;

(C) demonstrating, congregating, standing, sitting, lying down or posting or carrying signs on the north side of Center Road;

(D) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Center Road, and crossing Center Road at any place other than designated pedestrian crossings;

7. And further temporarily restrained, at the Planned Parenthood of Niagara County facility located at 15 Webster Street in North Tonawanda, New York, from demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on any portion of the public sidewalk directly in front of the facility;

8. And further temporarily restrained, at the Planned Parenthood of Niagara County facility located in the shopping plaza in the 1000 block of Portage Road at the intersection with Pine Avenue in Niagara Falls, New York, from:

   (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of the five driveway entrances to the shopping plaza;

   (B) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs within the outer three foot portion of the sidewalk in front of the shopping plaza;

   (C) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Pine Avenue or Portage Road adjoining the shopping plaza, and crossing either of these streets at any place other than designated pedestrian crossings;

9. And further temporarily restrained, at the Planned Parenthood of Niagara County facility located at 38 Heritage Court in the City of Lockport, New York, from:

   (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on any portion of the sidewalk on the block on which the facility is

located or the street in the block of Heritage Court in which the facility is located;

(B) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on any public sidewalk within fifteen feet of the intersection of Pine Street and Heritage Court;

(C) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present in or on any portion of the sidewalk on the north side of Walnut Street along the strip shopping mall that contains the Planned Parenthood facility;

(D) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of Walnut Street in the block that contains the Planned Parenthood facility, or crossing Walnut Street in any other place than designated pedestrian crossings;

10. And further temporarily restrained, at the Planned Parenthood of the Rochester/Syracuse Region, Inc. facility located at 222 West Main Street in the City of Batavia, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of the Holland Avenue driveway entrance to the facility;

(B) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs within the outer four foot width of the sidewalk along Holland Avenue;

(C) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs

in or on any portion of Holland Avenue or Route 5, or crossing these streets at any place other than designated pedestrian crossings;

11. And further temporarily restrained, at the facility of Dr. Morris Wortman at 200 White Spruce Boulevard in Rochester New York, from:

    (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of any driveway, walkway, or doorway entrance to such facilities;

    (B) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of the streets adjoining such facility, or crossing such streets in any place other than designated pedestrian crossings:

12. And further temporarily restrained, at the facility of Planned Parenthood of the Rochester/Syracuse Region in Greece, New York, from:

    (A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of any driveway, walkway, or doorway entrance to such facility;

    (B) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of the streets adjoining such facility, or crossing such streets in any place other than designated pedestrian crossings;

13. And further temporarily restrained, at Genesee Hospital in Rochester, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs, or being present within a buffer zone measured from fifteen feet from either edge of any driveway, walkway, or doorway entrance to such facility;

(B) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of the streets adjoining such facility, or crossing such streets in any place other than designated pedestrian crossings:

14. And further temporarily restrained, at Highland Hospital in Rochester, New York, from:

(A) demonstrating, congregating, standing, sitting, lying down, posting or carrying signs or being present within a buffer zone measured from fifteen feet from either edge of any driveway, walkway, or doorway entrance to such facility;

(B) demonstrating, congregating, standing, sitting, lying down, or posting or carrying signs in or on any portion of the streets adjoining such facility, or crossing such streets in any place other than designated pedestrian crossings:

15. And further temporarily restrained from inducing, directing, aiding or abetting in any manner, others to take any of the actions described in paragraphs 1 through 14, above; and

IT IS FURTHER ORDERED that at the site of a demonstration or protest at a facility covered by this Order, the United States Marshal for the Western District of New York shall read aloud all the general provisions of

this Order and any provision of this Order dealing with that particular facility. Plaintiffs' counsel shall be responsible for notifying the Marshal in a timely manner of the location of such demonstration or protest. Pursuant to 28 U.S.C. § 1921(d), the United States Marshals Service may require a deposit from plaintiffs to cover the fees and expenses associated with reading the Order; and

IT IS FURTHER ORDERED that this Order may be enforced by a motion for criminal and/or civil contempt; and

IT IS FURTHER ORDERED that each organization or person found in violation of this Order, in addition to any criminal contempt penalties assessed, shall be jointly and severally liable for actual damages incurred by any plaintiff or any facility at which a violation occurs or by any person who is injured by such a violation, and shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order; and

IT IS FURTHER ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution; and motion for criminal and/or civil contempt; and

IT IS FURTHER ORDERED that nothing in this Order shall be construed to prevent four "escorts" per facility, so identified by the facilities herein, from assisting patients of those facilities to enter or exit such facilities; and

IT IS FURTHER ORDERED that nothing in this Order shall be construed to supersede or diminish the obligation of federal, state and local law enforcement authorities to fulfill their duties and responsibilities in enforcing federal and state laws and local ordinances; and

IT IS FURTHER ORDERED that nothing in this Order shall be construed to limit or interfere with the ability of federal, state and local law enforcement authorities to take, if necessary, additional measures under the law, above and beyond the restrictions contained in this Order, to maintain order and keep the peace; and

IT IS FURTHER ORDERED that this Order shall supersede the modified preliminary injunction issued on December 22, 1995 and any previous injunction issued in the case of *Pro-Choice Network of Western New York et al. v. Project Rescue Western New York et al.*, 90-CV-1004A (W.D.N.Y.); and

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until modified by further Order, or until resolution of plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: April 15, 1999